No. 21-60743

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; GREG ABBOTT, Governor of the State of Texas;
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY;
FASKEN LAND AND MINERALS, LIMITED;
PERMIAN BASIN LAND AND ROYALTY OWNERS,
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of Action
by the Nuclear Regulatory Commission

BRIEF FOR FEDERAL RESPONDENTS

TODD KIM
Assistant Attorney General

JUSTIN D. HEMINGER
Attorney
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-5442
justin.heminger@usdoj.gov

MARIAN L. ZOBLER
General Counsel

ANDREW P. AVERBACH
Solicitor
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
(301) 415-1956
andrew.averbach@nrc.gov

CERTIFICATE OF INTERESTED PERSONS

No. 21-60743

State of Texas
v.
Nuclear Regulatory Commission

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Petitioners

    a. State of Texas

    b. Greg Abbott, Governor of Texas

    c. Texas Commission on Environmental Quality

    d. Fasken Land and Minerals, Ltd.

    e. Permian Basin Land and Royalty Owners

2. Counsel for Petitioners

    a. Michael Abrams, Office of Attorney General, State of Texas

    b. Ryan Baasch, Office of Attorney General, State of Texas

    c. Henry Carl Myers, Office of Attorney General, State of Texas

    d. Allan L. Kanner, Kanner & Whiteley, L.L.C.

    e. Annemieke M. Tennis, Kanner & Whiteley, L.L.C.

f. Monica Renee Perales

3. Respondents

a. United States Nuclear Regulatory Commission

b. United States of America

4. Counsel for Respondents

a. Andrew P. Averbach, U.S. Nuclear Regulatory Commission

b. Marian L. Zobler, U.S. Nuclear Regulatory Commission

c. Todd Kim, U.S. Department of Justice

d. Jennifer Scheller Neumann, U.S. Department of Justice

e. Justin D. Heminger, U.S. Department of Justice

5. Respondent-Intervenor

a. Interim Storage Partners, LLC

b. Orano CIS, LLC

c. Orano USA, LLC

d. Orano SA, owned by government of France, Mitsubishi, and Japan Nuclear Fuel

e. Waste Control Specialists, LLC

f. Fermi Holdings, Inc.

g. J.F. Lehman & Co.

6. Counsel for Respondent-Intervenor

   a. Brad Fagg, Morgan, Lewis & Bockius LLP

   b. Ryan K. Lighty, Morgan, Lewis & Bockius LLP

   c. Tim P. Matthews, Morgan, Lewis & Bockius LLP

/s/ Andrew P. Averbach
ANDREW P. AVERBACH

Attorney of Record for Respondent
U.S. Nuclear Regulatory Commission

STATEMENT REGARDING ORAL ARGUMENT

These Petitions for Review present a number of complex legal issues, both jurisdictional and under the substantive law involved, and the case arises in an unusual procedural context in which the issues that have been raised are substantially similar to issues raised in petitions for review pending in other circuit courts of appeals. The Nuclear Regulatory Commission and the United States (together, "Federal Respondents") accordingly believe that oral argument would be both appropriate and helpful to the Court in ensuring full understanding and deliberation of the questions presented.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Administrative Decisions

Decisions of the Nuclear Regulatory Commission

Decisions of the Atomic Safety & Licensing Board Panel

Statutes

Court Rules

Regulations

Federal Register Notices

GLOSSARY

AEA	Atomic Energy Act of 1954
APA	Administrative Procedure Act
EIS	Environmental Impact Statement
ISP	Interim Storage Partners, L.L.C.
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act of 1982
TCEQ	Texas Commission on Environmental Quality

INTRODUCTION

Both sets of Petitioners in this case—the State of Texas, Governor Greg Abbott, and the Texas Commission on Environmental Quality (collectively, "Texas"); and Fasken Land and Minerals, Limited and Permian Basin Land and Royalty Owners (together, "Fasken")—paint the picture in their briefs of a federal agency acting outside of its statutory authority and contravening the process that Congress has created to issue licenses permitting the temporary storage of spent nuclear fuel. But it is Petitioners, and not the Nuclear Regulatory Commission ("NRC" or the "Commission" [1]), whose arguments are inconsistent with settled federal law.

First, the merits of this dispute are not properly before this Court. This Court has jurisdiction only to resolve Article III cases or controversies. Yet neither Texas nor Fasken has established standing to pursue its claims. Further, the Atomic Energy Act of 1954 ("AEA") provides a hearing process for states and private entities like Petitioners to challenge NRC licenses and seek judicial review as "parties aggrieved" under the Hobbs Act. Petitioners failed to comply with the procedures that Congress created to raise challenges to the NRC's licensing actions, so they are barred from bringing their claims in this Court.

[1] We use the terms "NRC" or "agency" to refer to the agency as a whole, and the term "Commission" to refer to the collegial body that oversees the agency and issues rules and adjudicatory decisions on its behalf.

Second, even if the Court reaches the merits, the NRC acted within its delegated authority. Contrary to Petitioners' assertions, the NRC has not taken upon itself the task of selecting a site for the permanent disposal of nuclear waste. Rather, it has acted pursuant to the authority Congress gave it under the AEA. The AEA plainly authorizes the agency to issue materials licenses to private parties for the "possession" of the "source," "byproduct," and "special nuclear" material contained in spent nuclear fuel. 42 U.S.C. §§ 2073, 2092, 2111. Consistent with the AEA, the NRC issued the materials license in question to Respondent-Intervenor Interim Storage Partners, L.L.C. ("ISP"). Before doing so, the NRC conducted an exhaustive safety review that found spent fuel could be stored safely at the proposed facility during the 40-year term of the license. And in compliance with the National Environmental Policy Act ("NEPA"), the NRC identified and considered the potential environmental impacts of constructing, operating, and decommissioning the proposed facility, including reasonably foreseeable impacts after the ISP facility's license expires. Neither Texas nor Fasken has shown that the NRC exceeded its authority or acted contrary to the AEA, NEPA, the Nuclear Waste Policy Act of 1982 ("NWPA"), or the Administrative Procedure Act ("APA").

Accordingly, the Petitions for Review should be dismissed for lack of jurisdiction or, in the alternative, denied.

STATEMENT OF JURISDICTION

Petitioners assert that this Court has jurisdiction over the Petitions for Review under the Hobbs Act, the APA, and the NWPA. Texas Br. 3-4; Fasken Br. 1-3. But as explained below in Argument Section I *infra*, this Court lacks jurisdiction over the Petitions for Review for two independent reasons. First, Petitioners have failed to demonstrate standing, particularly because they will not suffer a concrete and imminent injury-in-fact from the NRC granting the license. Second, as set forth in the motions to dismiss that are pending before the Court, neither Petitioner seeks review of an NRC final order as a "party aggrieved" under the Hobbs Act. The Petitions therefore should be dismissed.

STATEMENT OF THE ISSUES

1. Whether Petitioners will incur an imminent and non-speculative injury-in-fact caused by the NRC's issuance of the ISP license, when Petitioners' briefs failed to establish their standing.

2. Whether Petitioners are "parties aggrieved" within the meaning of the Hobbs Act, when they either did not participate in the adjudicatory proceedings before the agency or do not seek review of the NRC's decision denying them party status.

3. Whether, as two courts of appeals have held, the AEA authorizes the NRC to issue materials licenses permitting the storage of spent nuclear fuel away from the reactor where it was generated.

4. Whether the NRC complied with NEPA in evaluating the potential environmental impacts of the proposed spent fuel storage facility, when it: (1) assessed the purpose and need for the license with due regard for the need for away-from-reactor storage options and evaluated alternatives based on this assessment; (2) considered the costs and benefits of the project based upon reasonable and judicially endorsed assumptions; and (3) determined that the impacts of an act of terrorism were not reasonably foreseeable and did not require study beyond the agency's evaluation of accidents at the proposed facility.

STATEMENT OF THE CASE

I. Statutory and regulatory background

A. The NRC's regulation of spent nuclear fuel

The NRC is an independent regulatory commission created by Congress. *See* Energy Reorganization Act of 1974, 42 U.S.C. § 5841. In the AEA, Congress conferred broad authority on the agency to license and regulate the civilian use of radioactive materials. *See* 42 U.S.C. §§ 2011-2297h-13. Along with regulating the construction and operation of nuclear power plants, the AEA authorizes the NRC to license and regulate the storage of high-level nuclear waste, including the

storage of spent nuclear fuel (fuel that is still radioactive but is no longer useful in the production of electricity) before its ultimate disposal.

The agency's authority to issue licenses to possess spent nuclear fuel and, in particular, licenses permitting away-from-reactor storage, derives directly from three AEA provisions. First, the AEA authorizes the NRC to issue licenses for the possession of "special nuclear material." 42 U.S.C. § 2073. Second, it authorizes the issuance of licenses to possess "source material." *Id*. § 2092. And, third, it authorizes the issuance of licenses for "byproduct material." *Id*. § 2111; *see also id*. § 2014 (defining each term). Spent nuclear fuel contains each of these types of materials. As a consequence of this authority, "it has long been recognized that the AEA confers on the NRC authority to license and regulate the storage and disposal of [spent] fuel." *Bullcreek v. NRC*, 359 F.3d 536, 538-39 (D.C. Cir. 1984); *see In the Matter of Private Fuel Storage, L.L.C.*, CLI-02-29, 56 N.R.C. 390, 395-96 (Dec. 18, 2002) (rejecting Utah's assertion that the NRC lacked statutory authority to issue a license for an away-from-reactor spent fuel storage facility); *Bullcreek*, 359 F.3d at 537-38 (affirming NRC's statutory authority to issue such a license).

Consistent with this statutory authority, the NRC's regulations in 10 C.F.R. Part 72 allow the agency to issue licenses permitting the storage of spent fuel both at the site of nuclear reactors and away from reactor locations. *See* 10 C.F.R. Part 72. Over many decades, the agency has issued Part 72 materials licenses

permitting the storage of spent nuclear fuel either away from reactors or at reactor sites that are no longer operating. Several of these facilities (which are referred to in Part 72 as independent spent fuel storage installations and known as ISFSIs) continue to operate today.

Storage of spent fuel under the AEA is distinct from *disposal*. The NWPA establishes the federal government's policy to permanently dispose of high-level radioactive waste in a deep geologic repository. *See* 42 U.S.C. §§ 10101-10270. Under the NWPA, Congress designated the Department of Energy ("DOE") as the agency responsible for designing, constructing, operating, and decommissioning a repository, *id.* § 10134(b); the U.S. Environmental Protection Agency ("EPA") as the agency responsible for developing radiation protection standards for the repository, *id*. § 10141(a); and the NRC as the agency responsible for developing regulations to implement EPA's standards and for licensing and overseeing construction, operation, and closure of the repository, *id*. §§ 10134(c)-(d), 10141(b).[2]

[2] Although Congress designated Yucca Mountain, Nevada, as the site for a first spent fuel repository, 42 U.S.C. § 10172, DOE announced in 2010 that it considered the site untenable and attempted to withdraw its license application (a request that the NRC did not grant). Since that time, Congress has not provided additional funding for the Yucca Mountain project and, while the NRC has spent substantially all the appropriated funds it has received and has completed its safety and environmental review of the repository, the project has stalled. *See generally Texas v. United States*, 891 F.3d 553, 565 (5th Cir. 2018) (dismissing petition for writ of mandamus brought by Texas, which sought to compel completion of proceedings for licensure of Yucca Mountain repository).

Importantly, in passing the NWPA, "Congress did not intend to repeal or supersede the NRC's authority under the AEA to license and regulate private use of private away-from-reactor spent fuel storage facilities." *Bullcreek*, 359 F.3d at 542; *see also Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1232 (10th Cir. 2004) (following the D.C. Circuit's decision in *Bullcreek* concerning the scope of NRC's authority under the AEA and agreeing that passage of the NWPA did not affect NRC's preexisting authority).

B. Avenues for participation in NRC's licensing proceedings

In the AEA, Congress provided interested persons with an opportunity to intervene in NRC licensing proceedings and to object to the issuance of a license. Specifically, AEA Section 2239 enables a person to request a hearing before the agency to contest the legal or factual basis for the agency's licensing decision. *See* 42 U.S.C. § 2239(a)(1).

Hearings are governed by the NRC's regulations. *See* 10 C.F.R. Part 2. To be "admitted" as a party to a licensing proceeding, an intervenor must, among other things, establish administrative standing and submit at least one "contention" setting forth an issue of law or fact to be controverted. *See id*. § 2.309(d), (f)(1). Even if a state or local government does not separately seek admission as a party, it is afforded by regulation a reasonable opportunity to participate in a hearing initiated by another intervenor. *Id.* § 2.315(c).

A hearing is available with respect to issues that are material to the agency's licensing decision. *See* 10 C.F.R. § 2.309(f)(1)(iv); *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1443 (D.C. Cir. 1984). This includes compliance not only with the AEA and the NRC's regulations, but also other statutes governing the agency's issuance of a license. And intervenors may challenge the NRC's compliance with NEPA through the NRC's adjudicatory process. *See, e.g., Beyond Nuclear v. NRC*, 704 F.3d 12 (1st Cir. 2013) (reviewing Commission disposition of contentions raised under NEPA) .

Under the NRC's rules, an applicant for a license to construct and operate a spent fuel storage facility must submit to the agency, along with its application, an "Environmental Report" containing an analysis of each of the considerations required by NEPA. 10 C.F.R. §§ 51.45, 51.61. Interested parties must raise contentions arising under NEPA by challenging the analysis in the Environmental Report. *Id*. § 2.309(f)(2). If any deficiencies in that analysis are not cured in the draft or final Environmental Impact Statement ("EIS") prepared by the NRC or if those documents contain new and materially different information, participants in the proceedings may seek leave to file new or amended environmental contentions after the intervention deadline to challenge the analyses in those documents. *Id*. § 2.309(c)(1).

NRC requirements governing the timing of environmental contentions have been upheld on judicial review and routinely applied in challenges to the issuance of licenses. *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56-57 (D.C. Cir. 1990) (rejecting facial challenge to NRC's procedural regulations, including to the requirement that intervenors raise contentions arising under NEPA, to the extent possible, based upon the license applicant's Environmental Report); *see, e.g.*, *NRDC v. NRC*, 879 F.3d 1202, 1208-09 (D.C. Cir. 2018) (recognizing that intervenor that had previously challenged environmental analysis in the license application had the opportunity to show good cause to pursue an amended contention challenging new information contained in draft EIS pursuant to 10 C.F.R. § 2.09(c)); *Beyond Nuclear*, 704 F.3d at 23 (1st Cir. 2013) (affirming NRC's denial of admission of contentions challenging applicant's Environmental Report but noting that petitioner could raise new contentions if new and materially different information became available).

If an intervenor does not obtain the relief that it requests through the hearing process, the AEA provides for judicial review of the agency's final order in the United States Court of Appeals for the circuit in which the petitioner is located or in the United States Court of Appeals for the District of Columbia Circuit. 42 U.S.C. § 2239(b) (specifying that the courts of appeals must review the agency's decision in accordance with the APA and the Hobbs Act); 28 U.S.C. § 2342(4)

(providing jurisdiction in the courts of appeals under the Hobbs Act); *see also id*. § 2343 (establishing venue for Hobbs Act cases).

II. Factual Background

Petitioners challenge the NRC's issuance of a Part 72 materials license to ISP in September 2021. The license authorizes ISP to store spent nuclear fuel in canisters using specified storage systems for a term of 40 years. Issuance of Materials License and Record of Decision, 86 Fed. Reg. 51,926 (Sept. 17, 2021); C.I.[3] 130.2 (license preamble) at 1-2; C.I. 130.3 (license) at 2; C.I. 130.4 (technical specifications) at 2-1. Under agency regulations, ISP is permitted to seek renewal of the license for a period of up to 40 additional years. 10 C.F.R. § 72.42(a). Such a request would trigger an additional safety and environmental review and a new opportunity for interested parties to seek a hearing. *See* 42 U.S.C. § 2239(a); 10 C.F.R. 72.42(b).

A. The license application

In April 2016, the NRC received an application for a license that would permit construction of a "consolidated interim spent fuel storage facility" (at times

---

[3] "C.I. __" refers to the "Record ID" number associated with each document listed in the Revised Certified Index of Record that the NRC filed on December 6, 2021 (Document No. 00516117700). A Record ID number followed by a period indicates that the document is part of a "package" in the NRC's ADAMS database (https://adams.nrc.gov/ehd/). The number after the period indicates the document within the package to which the cited material corresponds (i.e., C.I. 130.2 is the second document within the package for Record ID 130 in the certified index).

referred to as a CISF) in Andrews County, Texas, at an existing low-level- and hazardous-waste storage and disposal site. *See generally* Interim Storage Partners Waste Control Specialists Consolidated Interim Storage Facility, 83 Fed. Reg. 44,070 (Aug. 29, 2018), *corrected*, 83 Fed. Reg. 44,680 (Aug. 31, 2018); C.I. 125 at 2-4.[4] The facility, as proposed, would consist of dry cask storage systems stored on concrete pads (which systems have already been certified for use by the NRC in accordance with 10 C.F.R. Part 72), constructed in eight phases over the course of twenty years. C.I. 125 at 2-1 to 2-13; C.I. 134 at ES-1. These cask systems provide structural protection and radiation shielding for canisters that contain spent fuel. C.I. 134 at ES-1.

The original applicant requested suspension of the agency's safety and environmental review in July 2017. 83 Fed. Reg. at 44,0701. In July 2018, ISP, a partnership between the original applicant and another company, filed a request with the NRC to resume consideration of the license application. *Id.*

B. Public notice and opportunity to participate

The NRC provided public notice of the resumption of its consideration of the license application in the Federal Register. *Id*. at 44,071. The notice explicitly stated that interested persons had the opportunity to request a hearing and petition

[4] The materials related to the agency's review of the application and issuance of the license are available at https://www.nrc.gov/waste/spent-fuel-storage/cis/waste-control-specialist.html.

for leave to intervene as a party to the proceedings in accordance with the AEA. *Id.* The notice explained that a petition to intervene "should specifically explain the reasons why intervention should be permitted" and "must also set forth the specific contentions which the petitioner seeks to have litigated in the proceeding."). *Id.* (citing 10 C.F.R. § 2.309(d) and (f)). And the notice specifically invited governmental units, including states, to "submit a petition to the Commission to participate as a party under 10 [C.F.R. §] 2.309(h)(1)." *Id.*

C. The NRC's safety and environmental evaluations

In accordance with its obligations under the AEA and NEPA, the NRC conducted exhaustive safety and environmental reviews of the license application. Before formally docketing the license application, the NRC reviewed the information that ISP provided and issued 104 requests for supplemental information from the applicant. C.I. 8. As part of its safety and environmental review, the NRC issued another 241 requests for additional information to ISP. C.I. 38, 46, 57, 78, 84. ISP submitted four revisions of its license application, three revisions of its Environmental Report, and five revisions of the "Safety Analysis Report" that applicants are required to prepare.[5]

---

[5] These submissions, which are voluminous, are listed in the Revised Certified Index as C.I. 25, 31, 88, 96, 102, 103, and 124. They are available at https://www.nrc.gov/waste/spent-fuel-storage/cis/wcs/wcs-app-docs.html.

The NRC's ultimate determination that the proposed facility was consistent with adequate protection of the public health and safety as required by the AEA, is set forth in the agency's September 2021 Final Safety Evaluation Report. C.I. 134. That document reflects the agency's conclusions that the proposed facility will be designed, constructed, and operated so that public health and safety would be adequately protected at all times, including during normal and credible accident conditions. *Id.* at ES-3.

The agency also conducted an environmental review of the proposed facility as required by NEPA. In November 2016, the NRC published a notice of its intent to prepare an Environmental Impact Statement ("EIS") . *See* 81 Fed. Reg. 79,531 (Nov. 14, 2016). The NRC invited potentially affected federal, tribal, state, and local governments, organizations, and members of the public to provide comments on the scope of the EIS. *See id.* at 79,533. The agency held four public scoping meetings: one in Andrews, Texas, one in Hobbs, New Mexico, and two in Rockville, Maryland (with a virtual option). *See* C.I. 77 at A-3. After providing an extended period to submit scoping comments in Spring 2017, the agency reopened the scoping comment period in September 2018 for an additional two months. *See* 83 Fed. Reg. 44,922 (Sept. 4, 2018); 83 Fed. Reg. 53,115 (Oct. 19, 2018). The NRC considered comments received during both comment periods in determining the scope of the EIS.

In May 2020, after completing the scoping process, the NRC published a draft EIS (spanning nearly 500 pages) evaluating the effects of the proposed facility on 13 different resource areas.[6] The agency received over 2,500 unique comments on the draft EIS. C.I. 125 at D-1. Both the Texas Commission on Environmental Quality ("TCEQ") and Governor Abbott submitted comments on the draft, and Fasken submitted comments regarding the scoping process and on the draft EIS.[7]

The NRC issued its final EIS in July 2021.[8] Over nearly 700 pages, the NRC analyzed the reasonably foreseeable radiological and non-radiological potential environmental impacts arising from the construction, operation, and decommissioning of the proposed facility. The NRC examined potential impacts across thirteen different resource areas: land use, transportation, geology and soils, water resources, ecology, air quality, noise, cultural and historic resources, visual and scenic resources, socioeconomics and environmental justice, public and occupational health, and waste management. C.I. 125 at 2-25 to 2-29. And the NRC concluded that the potential environmental impacts of the facility would in

---

[6] The entirety of the draft EIS (C.I. 97) is available at https://www.nrc.gov/docs/ML2012/ML20122A220.pdf.

[7] Texas's comments are entries 1128 and 1148 in the certified index. Fasken's comments are entries 567, 537, 984, and 1560.

[8] The entirety of the EIS (C.I. 125) is available at https://www.nrc.gov/docs/ML2120/ML21209A955.pdf.

most cases be small, but in a few cases small to moderate. *Id.* The final EIS also includes the NRC's responses to Texas's, Fasken's, and all other timely comments that it received. *Id.* Appendix D.[9]

In the EIS, the NRC considered several potential alternatives to the ISP facility, including storage at a DOE-owned facility and alternate design or storage technologies. With respect to the first alternative, the NRC concluded that a DOE-owned facility would satisfy the purpose and need for the facility (i.e., the option for an away-from-reactor storage facility). *See id.* at 2-22. Nonetheless, it determined that a detailed comparison of the impacts of the ISP facility and a DOE facility could not be performed because a DOE facility was only in the planning stages and sufficient detail was not available to support such a comparison. *Id.* And with respect to the second alternative, the NRC determined that (a) other existing forms of licensed dry cask storage were not technologically superior; and (b) options proposed for "hardened" onsite storage of spent fuel at or near existing plants would not satisfy the purpose and need that the agency had identified for the

[9] In addition to the comments it provided during the scoping process and on the draft EIS, Fasken also submitted additional comments to the NRC, after publication of the final EIS and just two days before the agency issued the license to ISP. These comments included a "Final Environmental Impact Statement Review" prepared by an outside consultant, C.I. 128, upon which Fasken relies extensively in its Brief and which we discuss in Argument Section III *infra*. The NRC informed Fasken that NRC regulations do not provide for public comments on a final EIS, C.I. 133, and the agency did not consider this submission in issuing the license.

facility. *Id.* at 2-22 to 2-23. NRC further determined that none of the other potential sites that ISP identified through a screening process was clearly environmentally preferable. *Id.* at 2-23 to 2-25. Accordingly, the NRC's comprehensive evaluation of impacts compared the proposed ISP facility solely to the no-action alternative. *Id.* at 2-1, 2-25 to 2-29, 4-1 to 4-97.

In addition to evaluating the potential environmental impacts of constructing, operating, and decommissioning the ISP facility during the term of the proposed license, the agency also addressed the potential effects of storage *after* the licensed term of the ISP facility. Specifically, the NRC's NEPA analysis included its generic analysis of the impacts of onsite and offsite spent fuel storage contained in its Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel ("Continued Storage Generic EIS"). C.I. 125 at 1-7; *see* 10 C.F.R. § 51.23(b) ("The impact determinations in [the Continued Storage Generic EIS] regarding continued storage shall be deemed incorporated into the environmental impact statements" for affected licenses); *id.* § 51.97(a) (specifically incorporating the agency's generic analysis into EISs for spent fuel storage facilities licensed under 10 C.F.R. Part 72).[10] This analysis documents the agency's evaluation of the reasonably foreseeable impacts of the storage of spent

[10] The entirety of the Continued Storage Generic EIS is available at https://www.nrc.gov/docs/ML1419/ML14196A105.pdf.

fuel pending the shipment of spent fuel to a repository, including in a scenario in which a repository is not available. *See* Continued Storage Generic EIS at 1-13 to 1-15. *See generally New York v. NRC*, 824 F.3d 1012 (2016) (*New York II*) (upholding legal challenge to NRC rule adopting Continued Storage Generic EIS).

D. Issuance of the license

On September 10, 2021, Governor Abbott wrote a letter to the Chairman of the NRC, asserting that storage of spent fuel at the proposed facility would be illegal under a Texas statute that had been passed the day before. C.I. 127. Texas did not seek to raise a contention related to this statute or seek a stay of the issuance of the license through the agency's adjudicatory process.[11] Nor did Fasken or any of the entities who had requested a hearing before the agency seek such relief. In September 2021, the agency issued the license, C.I. 130.2, 130.3, a Final Safety Evaluation Report, C.I. 134, and a Record of Decision documenting its NEPA review, C.I. 129; *see* 10 C.F.R. § 51.102(a).

III. Procedural background

A. Proceedings before the Commission

In September 2018, Fasken and another entity, Beyond Nuclear, lodged with the Commission "motions to dismiss" the ISP application. Fasken and Beyond

[11] Under the procedures applicable to the ISP licensing proceeding, a party may seek to stay the effectiveness of a decision, such as the issuance of a license, by the NRC Staff. *See* 10 C.F.R. § 2.1213.

Nuclear asserted in their motions that the NRC's consideration of the applications violated the NWPA because the application sought authorization to store spent fuel to which DOE, rather than private parties, held title. The Commission denied the motions, explaining that the agency's rules do not provide for the filing of motions to dismiss license applications, but it referred the underlying arguments about the NWPA to the Commission's Atomic Safety and Licensing Board ("Licensing Board"), which had convened to adjudicate hearing requests that had already been filed.[12] Beyond Nuclear petitioned for review of the Commission's order in the D.C. Circuit, which dismissed the petition because the referral of the arguments to the Licensing Board was not a final order reviewable under the Hobbs Act. Order, *Beyond Nuclear, Inc. v. NRC*, D.C. Cir. No 18-1340, Document No. 1792613 (June 13, 2019).

Meanwhile, the Licensing Board considered the contentions filed by Fasken and Beyond Nuclear, as well as by several other organizations. These organizations asserted that issuance of the license would violate the AEA, the NWPA, and NEPA. Fasken raised six contentions before the agency that covered

[12] The Licensing Board is a panel of administrative judges, appointed by the Commission, that is authorized by the AEA to conduct hearings. 42 U.S.C. § 2241. The Commission's order denying the motion to dismiss and referring the underlying legal arguments to the Licensing Board is available at https://www.nrc.gov/docs/ML1830/ML18302A329.pdf.

topics similar to the issues that it has now raised before this Court.[13] Other organizations seeking to intervene raised contentions raising a wide spectrum of issues, including the assertions that the NRC lacks authority to issue a license for an away-from-reactor storage facility and to license fuel to which DOE owns title; that the agency failed to evaluate alternatives; and that the agency failed to consider the impacts of terrorism.[14] Texas did not seek to intervene.

The Licensing Board issued four decisions ruling on the admission of the proposed contentions and motions to submit amended contentions. With the exception of one contention that was admitted but was subsequently dismissed as moot, the Licensing Board declined to admit the contentions, and it denied the organizations intervenor status.[15] The organizations filed seven appeals to the

---

[13] Fasken's contentions are available at https://www.nrc.gov/docs/ML1830/ML18302A412.pdf and https://www.nrc.gov/docs/ML2018/ML20189A581.html.

[14] Beyond Nuclear's contention is available at https://www.nrc.gov/docs/ML1827/ML18276A242.pdf. Sierra Club also sought to intervene; its contentions are available at https://www.nrc.gov/docs/ML1831/ML18317A410.html and https://www.nrc.gov/docs/ML1925/ML19256C632.html. Finally, a group of organizations led by Don't Waste Michigan (and referred to before the Commission as "Joint Petitioners") proposed contentions before the agency that are available at https://www.nrc.gov/docs/ML1831/ML18317A433.pdf.

[15] *Interim Storage Partners LLC*, LBP-19-07, 90 N.R.C. 31 (Aug. 23, 2019); *Interim Storage Partners LLC*, LBP-19-09, 90 N.R.C. 181 (Nov. 18, 2019); *Interim Storage Partners LLC*, LBP-19-11, 90 N.R.C. 358 (Dec. 13, 2019); *Interim Storage Partners LLC*, LBP-21-02 (Jan. 29, 2021) (available at https://www.nrc.gov/docs/ML2102/ML21029A084.pdf).

Commission from those Licensing Board decisions, and the Commission issued four orders resolving those appeals.[16]

B. Proceedings in the courts of appeals

After the Commission denied party status to Fasken, Beyond Nuclear, Sierra Club, and Don't Waste Michigan, those organizations filed four petitions for review in the D.C. Circuit, challenging the Commission orders, which the court consolidated.[17]

Following the issuance of the license in September 2021, various petitioners filed additional petitions for review in three courts of appeals. First, Beyond Nuclear, Sierra Club, and Don't Waste Michigan filed four more petitions for review in the D.C. Circuit, challenging the license and associated agency actions.[18] The D.C. Circuit consolidated those petitions with the four original petitions, and

---

[16] *Interim Storage Partners LLC*, CLI-20-13, 92 N.R.C. 457 (Dec. 4, 2020); *Interim Storage Partners LLC*, CLI-20-14, 92 N.R.C. 463 (Dec. 17, 2020); *Interim Storage Partners LLC*, CLI-20-15, 92 N.R.C. 491 (Dec. 17, 2020); *Interim Storage Partners LLC*, CLI-21-09, 2021 WL 2592844 (June 22, 2021).

[17] *Don't Waste Michigan v. NRC*, D.C. Cir. No. 21-1048; *Sierra Club v. NRC*, D.C. Cir. No. 21-1055; *Beyond Nuclear* v. *NRC*, D.C. Cir. No. 21-1056; *Fasken Land and Minerals, Ltd. v. NRC*, D.C. Cir. No. 21-1179.

[18] *Sierra Club v. NRC*; D.C. Cir. No. 21-1227; *Sierra Club v. NRC*, D.C. No. 21-1229; *Beyond Nuclear v. NRC*, D.C. Cir. No. 21-1230; *Don't Waste Michigan v. NRC*, D.C. No. 21-1231.

briefing on the eight consolidated petitions, including Fasken's petition, is scheduled to be complete by July 2022.[19]

Second, Texas and Fasken petitioned for review in this Court. Fasken's Petition in this Court challenges the issuance of the license (again, distinct from its petition in the D.C. Circuit challenging the Commission's adjudicatory decisions denying it party status). Federal Respondents moved to dismiss Texas' Petition and to dismiss Fasken's Petition or in the alternative transfer the Petition to the D.C. Circuit. This Court carried both motions with the case.

Third, the State of New Mexico, which (like Texas) had not participated in the adjudicatory proceedings before the NRC, filed a petition for review of the license in the United States Court of Appeals for the Tenth Circuit. That court also opted to carry Respondents' motion to dismiss for lack of jurisdiction with the case. Briefing on New Mexico's petition is scheduled to be complete by June 2022.[20]

---

[19] Petitioners filed their opening briefs in the consolidated cases in March 2022. *See Don't Waste Michigan v. NRC*, D.C. Cir. 20-1048, Document Nos. 1939572 (brief of Beyond Nuclear), 1939676 (Fasken), 1939761 (Don't Waste Michigan and Sierra Club).

[20] In March 2021, New Mexico also filed a complaint in the United States District Court for the District of New Mexico, challenging the licensing of the ISP facility and another interim storage facility in New Mexico for which a license application is pending. The NRC moved to dismiss the case, and the court granted the NRC's motion. *See* Order, *Balderas v. NRC,* No. 1:21-cv-00284-JB-JFR, Document No. 48 (D.N.M. Mar. 21, 2021).

SUMMARY OF ARGUMENT

1. This Court lacks jurisdiction to entertain the Petitions for Review, both due to lack of standing (an issue that neither Petitioner raises at all) and because neither Petitioner is a party aggrieved with respect to the issuance of the license.

a. It is not evident why either Texas or Fasken face a concrete and imminent injury caused by issuance of the license to ISP. The remote and speculative possibility that an accident conceivably could occur at some unknown point in the future, either at the ISP site or during transportation of materials to the site does not, without more, constitute injury to a legally protected interest of either Petitioner.

b. In addition, as we explain in our motions to dismiss, the AEA and Hobbs Act required both Petitioners to first raise their arguments as contentions during the NRC's adjudicatory process and then to challenge the final orders resulting from that proceeding. Texas did not attempt to participate, and although Fasken raised contentions, it was denied admission in orders that it is challenging in the D.C. Circuit. In both instances, Petitioners should not be allowed to evade the agency-adjudication-exhaustion requirement that Congress codified in the AEA and the Hobbs Act.

2. Issuance of the license is consistent with both the AEA and the NWPA.

a. NRC had delegated authority to issue the license. As the text of the AEA provides, and as two courts of appeals have held, Congress conferred upon the NRC the authority to license facilities for the possession of the source, byproduct, and special nuclear material contained in spent nuclear fuel. The agency's authority is apparent from the plain text of the statute, and Congress did not impliedly revoke that authority through passage of the NWPA. Even if the statute were ambiguous, the agency has articulated a permissible construction of its organic authority in a formal adjudication, and this Court must defer to that permissible interpretation.

b. Nor does the issuance of the license constitute an end run around the NWPA's prohibitions. First, the license does not create a *de facto* repository. It is term-limited, and the agency has fully acknowledged the need for a new storage facility following the expiration of ISP facility's term if a repository is not available. The D.C. Circuit has upheld this analysis. And second, ISP has acknowledged that, under existing law, it cannot store fuel to which DOE holds title. The license provision about which Fasken complains merely requires that ISP contract with the title-holder of the fuel being stored to provide funding necessary to sustain facility operations. And the Commission has clearly

recognized that a contractual commitment that would be illegal because it violates the NWPA cannot satisfy this requirement of the ISP license. The license thus does not authorize illegal fuel storage.

3. Petitioners' NEPA-based arguments are unpersuasive.

a. The agency issued the license on the basis of its determination that the facility could be operated safely. However, the NRC properly recognized, as part of its NEPA analysis, that the applicant sought to provide the *option* to spent fuel owners to ship fuel to away-from-reactor storage facilities, thereby affording operating reactors additional space to store discharged fuel and permitting decommissioning reactors to use their sites for a different purpose following decommissioning. The agency properly and reasonably eliminated consideration of alternatives in its EIS that would not further this interest. Further, this purpose is consistent with the AEA,

b. The agency likewise made reasonable assumptions concerning the availability of a permanent repository. It properly incorporated its generic NEPA analysis of the potential impacts of storing spent fuel after the licensed life of the ISP facility, including the scenario in which a repository does not become available. The agency's conclusions are consistent with the generic analysis that has been codified into regulation and upheld on judicial review. To the extent Texas or Fasken disagrees with the NRC's environmental analysis, it has the

option to file a petition for rulemaking challenging it, and it had the option to participate in the adjudicatory proceedings and seek a waiver from its applicability. But it cannot be challenged before this Court without having first been challenged before the agency.

c. Finally, the agency was not required in its NEPA analysis to specifically evaluate the risk of a terrorist attack. As the Supreme Court has recognized, and as several circuit courts have held, NEPA does not require consideration of impacts that are not proximately caused by a major federal action and are instead caused by an intervening event. Any impacts caused by an act of terrorism would be caused by a classic intervening event, namely, the undertakings of a third-party criminal actor. In any event, the agency has addressed the probability and consequences of the natural and man-made accident scenarios that a terrorist might seek to create. And the agency has determined that the likelihood of such an occurrence is very low and that the associated risk is therefore small. Its evaluation of these impacts therefore fully complies with NEPA.

STANDARD OF REVIEW

Pursuant to the AEA, 42 U.S.C. § 2239(b), judicial review of final orders in licensing proceedings is to be conducted "in the manner prescribed in" the Hobbs Act and the APA. Under the APA, an agency's decision "is valid unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law.'" *Luminant Generation Co. v. EPA*, 714 F.3d 841, 850 (5th Cir. 2013) (quoting 5 U.S.C. § 706(2)(A)).

In considering the agency's resolution of the arguments that petitioners have raised, the Court should be mindful that the "the Commission's licensing decisions are generally entitled to the highest judicial deference because of the unusually broad authority that Congress delegated to the agency under the Atomic Energy Act." *Massachusetts v. NRC*, 924 F.2d 311, 324 (D.C. Cir. 1991). And a "reviewing court must be 'most deferential' to the agency where, as here, its decision is based upon its evaluation of complex scientific data within its technical expertise." *BCCA Appeal Group v. EPA*, 355 F.3d 817, 824 (5th Cir. 2003) (quoting *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983)).

This Court's role with respect to an agency's compliance with NEPA is limited. Its inquiry is confined to the questions of (1) whether the agency in good faith objectively has taken a hard look at the environmental consequences of a proposed action and alternatives; (2) whether the EIS provides detail sufficient to allow those who did not participate in its preparation to understand and consider the pertinent environmental influences involved; and (3) whether the EIS's explanation of alternatives is sufficient to permit a reasoned choice among different courses of action. *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000).

ARGUMENT

I. This Court lacks jurisdiction over the Petitions for Review.

A. Petitioners lack Article III standing.

Standing is a component of the Court's subject-matter jurisdiction. *Env't Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 364 (5th Cir. 2020). For a party to have standing, it must "have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Inclusive Communs. Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 654 (5th Cir. 2019).

Critically, the party invoking the Court's jurisdiction bears the burden of establishing each element of the standing triad. *Id.* (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998)). Thus, "[l]ike a plaintiff who files a complaint, a petitioner who seeks review of agency action invokes federal jurisdiction and therefore bears the burden of establishing standing." *Center for Biological Diversity v EPA*, 937 F.3d 533, 536 (5th Cir. 2019); *see also Shrimpers & Fishermen of the RGV v. TCEQ*, 968 F.3d 419, 423 (5th Cir. 2020) ("We agree with our sister circuits that in direct appellate review of a final agency action, 'the petitioner carries a burden of production' with respect to standing that is 'similar to that required at summary judgment.'" (quoting *Sierra Club v. EPA*, 793 F.3d 656, 662 (6th Cir. 2015)).

Unless standing is self-evident, this means that a petitioner must "present specific facts supporting standing through citations to the administrative record or 'affidavits or other evidence' attached to its opening brief," *Sierra Club*, 793 F.3d at 662 (quoting *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002)), and it may not do so on reply, *Sierra Club*, 292 F.3d at 900; *see also Shrimpers & Fishermen of RGV*, 968 F.3d at 423 ("This means that a petitioner's claim of standing cannot rest on mere allegations, but must instead be supported by citations to specific facts in the record."); *id*. (citing approvingly to *Sierra Club*, 292 F.3d at 899-901). Neither Petitioner addressed standing in its opening briefs. *Cf.* Fed. R. App. P. 28(a)(4) (requiring appellant's brief to contain a "jurisdictional statement," including "the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction"). And as discussed below, the basis for either Petitioner to assert standing in this case is far from self-evident, especially as to any injury-in-fact.

As to Texas, it is settled law that the Court may not relax the standing requirement based on the assertion that Texas is acting on behalf of its citizens because states may not claim *parens patriae* standing in suits against the United States. *Massachusetts v. Mellon*, 262 U.S. 447, 485-486 (1923); *see, e.g.*, *State ex rel. Sullivan v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992) ("[T]he State does not have standing as a *parens patriae* to bring an action on behalf of its citizens against

the federal government because the federal government is presumed to represent the State's citizens."); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011) (same); *Government of Manitoba v. Bernhardt*, 923 F.3d 173, 176 (D.C. Cir. 2019) (same).

Thus, to invoke the Court's jurisdiction, both Texas and Fasken must demonstrate that they have suffered cognizable injury to their interests—one that is "actual or imminent," rather than one that merely presents the possibility of future injury. *Shrimpers*, 968 F.3d at 424 (noting that this standard is met only by evidence of a "certainly impending" or "substantial risk of" harm, and that a mere increase in risk does not in and of itself satisfy the injury-in-fact requirement). Neither Petitioner has met this burden or even attempted to do so. To be sure, the ISP facility would be constructed within Texas' borders. But even if Texas or Fasken had interests that were located near the ISP facility, that would be insufficient to show an injury in fact to those interests. As this Court held in *Shrimpers*, and as the TCEQ asserted in that case, merely living within a few miles of a proposed facility that is alleged to pose a danger does not evidence either a "certainly impending harm [or] a substantial risk of harm" sufficient to confer standing. *Id.* at 425; *see* Brief of Respondent TCEQ, 2019 WL 5296555 at *41 (noting that "Petitioners have not shown evidence of imminent injury from the proposed facility's emissions"); *see also Ctr. for Biological Diversity*, 937 F.3d at

537 (5th Cir. 2019) ("But such environmental interests cannot support an injury in fact unless they have been actually harmed or imminently will be.").

Indeed, Texas and Fasken's briefs are devoid of any assertion—whether in the statement of jurisdiction or in the argument section—undermining the NRC's record-based conclusion that the facility would pose no credible threat to protection of the health and safety of the public. Injury sufficient to confer Article III standing simply cannot be presumed in these circumstances.

Nor can the Court presume or speculate what injury might befall Petitioners. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) ("While it is certainly possible—perhaps even likely—that one individual will meet all of these criteria, that speculation does not suffice."). Both Petitioners failed to make any effort to demonstrate any of the components of standing before the Court. In the absence of any demonstrated Article III injury, this Court should dismiss the Petitions for lack of standing.

B. Petitioners are not "parties aggrieved" within the meaning of the Hobbs Act.

As we have described above, the Court carried our motions to dismiss the Petitions of both Texas and Fasken with the case. Those motions established that to obtain judicial review of an NRC license as a "party aggrieved," a party must have participated in the adjudicatory proceedings before the agency by submitting adequate contentions under 10 C.F.R. § 2.309, *NRDC v. NRC*, 823 F.3d 641, 643

(D.C. Cir. 2016), or it must seek review of the Commission's decision denying its request for party status, *Alaska v. FERC*, 980 F.2d 761, 763 (D.C. Cir. 1992); *see Nat'l Parks Conservation Ass'n v. FERC*, 6 F.4th 1044, 1049 (9th Cir. 2021).

We incorporate our arguments in support of dismissal from our motions and replies into this brief . However, now that we have reviewed Petitioners' briefs, we provide the following additional observations concerning the Court's jurisdiction here. First, the fact that three courts of appeals are proceeding to review the same license and to hear overlapping jurisdictional and merits issues, with the attendant risk of conflicting decisions, confirms the principles underlying our motions to dismiss.[21] Congress contemplated that judicial review of NRC licensing decisions would be channeled through the agency's adjudicatory process. 42 U.S.C. § 2239. Under that process, parties seek to be heard first by the NRC—which Congress recognized as the experts in a highly technical field—and the agency's disposition of their arguments would in turn be subject to judicial review under the Hobbs Act. Allowing litigants to challenge the license itself, divorced from the agency's adjudicatory proceedings, effectively nullifies the exhaustion requirement. This is not what Congress intended when, in enacting the AEA and

[21] The risk of a conflicting decision is sharpened here because the other two courts of appeals where petitions are pending, the D.C. Circuit and Tenth Circuit, have both held that the NRC has authority under the AEA to issue away-from-reactor licenses. *See* Argument Section II.A *infra.*

channeling judicial review of licensing decisions to the courts of appeals, it created a "coherent plan for the development and regulation of nuclear energy" that would enable "prompt implementation of national nuclear policy." *Quivira Mining Co. v. EPA*, 728 F.2d 477, 481 (10th Cir. 1984).

Second, while there is no justification for departing for the exhaustion requirement for any reason, the only conceivable basis for entertaining any of Petitioners' arguments is the so-called *ultra vires* exception that this Court discussed in *American Trucking Associations, Inc. v. ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982). As we explained in our motions to dismiss, however, the language in *American Trucking* describing that exception is dicta, has been roundly and properly criticized because any *ultra vires* review should not be allowed to excuse statutory exhaustion requirements, and does not apply here. *See, e.g.*, *In re Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 799 F.2d 317, 334-35 (7th Cir. 1986) (Easterbrook, J.) (criticizing *American Trucking* and holding that *ultra vires* review was incompatible with the Hobbs Act's "party aggrieved" requirement).

Even in circuits that have recognized an *ultra vires* exception to requirements such as a statute of limitations, challengers bear a heavy burden to invoke it because review under this theory is "exceedingly narrow." *Merchants Fast Motor Lines v. ICC*, 5 F.3d 911, 922 (5th Cir. 1993). It requires a showing, initially, that the challenged action "contravene[s] 'clear and mandatory' statutory

language." *Pac. Mar. Ass'n v. Nat'l Labor Relations Bd.*, 827 F.3d 1203, 1208 (9th Cir. 2016) (quoting *Leedom v. Kyne*, 358 U.S. 184, 188 (1958)). In other words, the agency must be "charged with violating a clear statutory mandate or prohibition." *Sheehan v. United States*, 896 F.2d 1168, 1174 (9th Cir. 1990). And to invoke *ultra vires* review, "the party seeking review must be "wholly deprive[d] of a meaningful and adequate means of vindicating its statutory rights." *Pac. Mar. Ass'n*, 827 F.3d at 1208 (quoting *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991)); *see also Long Term Care Partners, LLC v. United States*, 516 F.3d 226, 233 (4th Cir. 2008); *Nat'l Air Traffic Controllers Ass'n AFL–CIO v. Fed. Serv. Impasses Panel*, 437 F.3d 1256, 1263 (D.C. Cir. 2006).

Neither condition is met here, and neither Petitioner makes any effort in its brief to demonstrate otherwise. As an initial matter, only one of Texas's arguments and one of Fasken's arguments could possibly qualify for the exception. *See* Texas Br. 15-27 (asserting that the NRC lacks authority to issue a license under the AEA to issue an away-from-reactor storage facility); Fasken Br. 21-28 (asserting that the agency lacks authority to issue a license that would permit the storage of fuel to which DOE holds title). Indeed, were the scope of the exception defined otherwise, *any* argument could be framed as an allegation that an agency acted without statutory authority simply by asserting that an agency lacks authority

to issue a license that violates applicable statutory or regulatory requirements. At a minimum, then, Petitioners' assertions (i.e., those raised in Points II and III of Texas's brief and Points II, III, and IV of Fasken's brief) challenging the process by which the agency issued the license, or the assumptions the agency made or the conclusions the agency reached to support its issuance of the license, should be dismissed for lack of jurisdiction (and, specifically, failure to exhaust).

And as to Petitioners' arguments challenging the NRC's statutory authority (which we address in Argument Section II *infra*), the AEA squarely permits the NRC to issue licenses to "possess" the radiologically significant components of spent nuclear fuel, and the agency's authority to issue such licenses has already been recognized by two federal circuit courts. There is thus no statutory prohibition against the issuance of a license permitting an away-from-reactor storage facility, let alone a clear one. Instead, Petitioners' challenge can, at most, be characterized as one of statutory interpretation concerning the scope of agency authority rather than a clear transgression of agency limits. *See Neb. State Legis. Bd., United Transp. Union v. Slater*, 245 F.3d 656, 659-60 (8th Cir. 2001).

Further, Petitioners were not "deprived" of the ability to raise arguments as part of the adjudicatory process before the agency, as is required to support *ultra vires* review. Instead, Petitioners had a full and fair opportunity to raise them before the Commission. The arguments that Texas raises concerning the scope of

AEA authority mirror those that Utah raised when it challenged the issuance of an away-from-reactor spent fuel storage license in an adjudicatory proceeding. These arguments were considered and rejected by the Commission and, in turn, considered and rejected by the D.C. Circuit. *In the Matter of Private Fuel Storage*, CLI-02-29, 56 N.R.C. 390 (Dec. 18, 2002) (Commission decision rejecting Utah's assertion raised in connection with adjudication that the NRC lacked statutory authority to issue license for away-from reactor spent fuel storage facility); *Bullcreek v. NRC*, 359 F.3d 536 (D.C. Cir. 2004) (denying petition for review). Likewise, most if not all of the arguments that Fasken raises parallel the arguments that were in fact properly raised as contentions before the Commission as part of the adjudicatory process, and that are now the subject of the petitions for review pending before the D.C. Circuit.[22]

[22] This is true both of Fasken's NWPA-based arguments and its arguments arising under NEPA. *Compar*e Fasken Br. 22-23 (section entitled "The NWPA Prohibits the ISP CISF from Storing DOE-Owned SNF") *with* Brief of Beyond Nuclear, *Don't Waste Michigan v. NRC*, D.C. Cir. No. 21-1048 (Document No. 1939572) 17-19 (asserting that NRC "flouted the plain language of the NWPA" because "ISP's license explicitly allows ISP to contract with DOE for storage of DOE-owned spent fuel"); *compare* Fasken Br. 35-45 (section entitled "The NRC's Failure to Evaluate a Single Reasonable Alternative is Unreasonable and Inconsistent with Its Own Guidance and Regulations with Prior Agency EISs") *with* Brief of Don't Waste Michigan and Sierra Club, *Don't Waste Michigan v. NRC*, D.C. Cir. No. 21-1048 (Document No. 1939761) 16-18 (section entitled "The NRC Allowed an Inadequate Examination and Evaluation of Alternatives").

Simply stated, Petitioners' arguments in this Court could and should have been developed before the agency so that an adjudicatory record could be assembled and the Commission's views could be presented, as Congress intended. And there is no reason for Fasken to be afforded a second bite at the petition-for-review apple, unmoored from its unsuccessful attempt to participate in the licensing adjudication. Neither Petitioner should be permitted to evade the participation and exhaustion requirements that Congress created when it specified the process of judicial review for NRC licenses. To allow otherwise would disregard the statutory exhaustion requirements in this case and incentivize parties to ignore the requirement in future NRC licensing actions, to the detriment of both comprehensive agency decisionmaking in the first instance and efficiency in subsequent judicial review The Petitions should therefore be dismissed for lack of subject-matter jurisdiction, not only because of a failure of Petitioners to allege, let alone demonstrate, injury-in-fact but because, with respect to their assertions here, Petitioners are not "parties aggrieved" within the meaning of the Hobbs Act.

II. The Atomic Energy Act authorizes the NRC to issue a materials license to ISP.

The NRC granted the materials license to ISP "pursuant to the Atomic Energy Act." C.I. 130.3 (license) at 1; *see also* C.I. 130.2 (license preamble) at 1. Texas's primary argument in this case is that "[n]o language in the [AEA] grants

the Commission the power to license private, away-from-reactor storage facilities for spent nuclear fuel." Br. 15. That is incorrect for two reasons.

First, the plain text of the AEA authorizes the NRC to license facilities to possess nuclear materials, including the components of spent nuclear fuel. Indeed, two federal courts of appeals have already upheld that authority against similar challenges. And even if the NRC's authority were not clear from the Act's plain text, the Commission has reasonably interpreted the Act to authorize away-from-reactor facilities. In fact, the NRC has exercised that authority for decades. Texas's interpretation of the Act is so extreme that not even its co-Petitioner Fasken can agree with it. As Fasken correctly states, "the NRC is authorized to license privately-owned and operated away-from-reactor interim facilities for storage of private SNF." Br. 23. This Court should hold the same.

Second, Texas' and Fasken's challenges based on the NWPA are misguided. The NWPA established Congress's framework for selecting a repository to permanently *dispose* of spent nuclear fuel. It does not erase the NRC's pre-existing authority under the AEA to ensure that spent fuel continues to be *stored* safely before a repository is built, and the conditions that Congress placed on the federal government's authority to construct either a repository or interim storage do not affect the NRC's pre-existing authority to license private facilities under the AEA.

A. The Act unambiguously grants the NRC authority to issue licenses to private parties to possess nuclear material.

"The preeminent canon of statutory interpretation requires the Court to presume that the legislature says in a statute what it means and means in a statute what it says. *Asadi v. G.E. Energy (USA)*, 720 F.3d 620 (5th Cir. 2013) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (cleaned up)). "If the statutory text is unambiguous, [the Court's] inquiry begins and ends with the text." *Id.* "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

In this case, the text of the licensing provisions of the AEA, combined with the context of the statute as a whole, could not be more clear. The AEA plainly authorizes the agency to issue licenses for the "possession" by private parties of the "special nuclear," "source," and "byproduct" material contained in spent nuclear fuel. 42 U.S.C. §§ 2073, 2092, 2111. The clarity of this grant of authority dispenses with Texas's assertions (Br. 15-16) that Congress has failed to speak clearly with respect to the allocation of authority over allegedly major questions.

Moreover, the provisions granting NRC the authority to issue materials licenses do not restrict the agency's authority to issue licenses to particular places, such as at the site of reactors, as Texas asserts (Br. 17 & n.6). Indeed, it has long

been established that the NRC's authority under the AEA to regulate the civilian possession, use, and transfer of all of the constituents of spent nuclear fuel—i.e., special, source, and byproduct materials—is comprehensive and exclusive. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983) (recognizing that the AEA gives NRC "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials"); *Siegel v. Atomic Energy Comm'n*, 400 F.2d 778, 783 (D.C. Cir. 1968) (regulatory scheme codified in the AEA is "virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives."). It would be "illogical in the extreme" to believe that in enacting the AEA, Congress left a gap in the NRC's otherwise exclusive and plenary authority by excluding an authorization to store spent fuel when it is stored away from reactors. *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 131 (1987).

Texas asserts in its brief that the AEA only contemplates the licensure of "utilization and production facilities"[23] and that the AEA is silent about the NRC's

[23] A "utilization facility," which generally refers to a nuclear reactor, is defined as "(1) any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for

authorization to issue a license for a consolidated interim storage facility. Br. 16. Relying on 42 U.S.C. § 2131, it further asserts that "[i]n order to handle nuclear materials, private persons must generally obtain 'a license issued by the Commission pursuant to' specific sections of the Atomic Energy Act" governing these types of facilities. *Id.* But its fixation on the type of facility ISP intends to operate ignores the nature of the license that the NRC issued to ISP—a materials license that permits the *possession* of source, byproduct, and special nuclear materials, as is separately permitted by other sections of the AEA. The Act does not, as Texas suggests, limit the types of licenses that the NRC is permitted to issue to particular types of facilities, and it does not limit the ability to "handle nuclear materials," Br. 16, to licensees who operate production and/or utilization facilities, or any other type of facility.

This distinction is borne out by the agency's practice, both in this case and historically. Indeed, the license issued to ISP is a materials license that permits

---

making use of atomic energy in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission." 42 U.S.C. § 2012(cc). A "production facility," which generally refers to a fuel fabrication or enrichment facility, is defined as "(1) any equipment or device determined by rule of the Commission to be capable of the production of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission." *Id.* § 2012(v).

ISP to "receive, acquire, and possess" "Byproduct, Source, and/or Special Nuclear Material" and that bears the number "SNM-2515." C.I. 130.3 (license). In this context, of course, "SNM" refers to "special nuclear material." And this is one of numerous instances over the last forty years in which it the NRC, acting pursuant to its authority under 10 C.F.R. Part 72, has issued a license (bearing the "SNM" designation) to private parties to store spent fuel away from operating reactor sites. *See* Notice of Issuance of Materials License SNM-2513 for the Private Fuel Storage Facility, 71 Fed. Reg. 10,068 (Feb. 28, 2006) (materials license for away-from-reactor spent fuel storage facility in Tooele County, Utah); General Electric Co. Morris Operation, Environmental Review and Evaluation, Negative Declaration, 47 Fed. Reg. 20,231 (May 11, 1982) (renewal of materials license SNM-2500 for away-from reactor spent fuel storage facility in Morris, Illinois); *see also* Public Service Co. of Colorado; Issuance of Materials License SNM-2504, Fort St. Vrain Independent Spent Fuel Storage; Installation at the Fort St. Vrain Nuclear Generating Station, 56 Fed. Reg. 57,539 (Nov. 12, 1991) (materials license awarded under 10 C.F.R. Part 72 at site of decommissioning reactor).

No court has ever held that this longstanding practice, which itself is a product of the notice-and-comment rulemaking efforts that codified Part 72, somehow violates the AEA. Indeed, the two courts of appeals that have considered this issue have confirmed, in the face of arguments mirroring those that Texas

raises here, that, by enacting the AEA, Congress granted the NRC to power to issue licenses permitting an away-from-reactor spent fuel storage facility. In *Bullcreek v. NRC*, the Court of Appeals for the D.C Circuit explained that the AEA "authorized the NRC to regulate the possession, use, and transfer of the constituent materials of spent nuclear fuel, including special nuclear material, source material, and byproduct material." 359 F.3d at 538. And it further recognized that the agency had promulgated its regulations for licensing both onsite and away-from-reactor storage "[p]ursuant to its AEA authority." *Id.* Likewise, in *Skull Valley Band of Goshute Indians v. NRC*, the Court of Appeals for the Tenth Circuit rejected a challenge to the NRC's licensing authority under the AEA and stated that it was "persuaded" by the D.C. Circuit's analysis. 376 F.3d at 1232. Texas's assertion that the courts have somehow not addressed the question of the NRC's AEA authority, Br. 23-24, misreads those decisions.

In addition to its primary argument challenging the NRC's preexisting AEA authority, Texas further asserts that any authority that the agency possessed to license away-from reactor spent fuel storage was revoked by the NWPA. Again, however, it is mistaken. The two courts of appeals that have addressed this argument have squarely rejected it. *See Bullcreek*, 359 F.3d at 542 ("The NRC's authority . . . originated with the AEA, and nothing in the text of § 10155(h) [of the

NWPA] suggests that Congress intended to repeal this authority."); *Skull Valley*, 376 F.3d at 1232. And for good reason.

Repeating arguments raised by Utah in *Bullcreek*, Texas emphasizes 42 U.S.C. § 10155, which empowers the Secretary of Energy to construct an interim storage facility. That provision further provides that "[n]othing in [the NWPA] shall be construed to encourage, authorize, or require the private or Federal use . . . of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government." Br. 19 (citing 42 U.S.C. § 10155(h)). But the plain text of this provision refers only to the NWPA itself. *Id.* § 10155(h) ("nothing *in this chapter*") (emphasis added). It says nothing about the agency's authority under *other*, preexisting legislation (i.e., the AEA) governing spent fuel storage. And the provision begins with the clause "[n]otwithstanding any other provision of law," which necessarily covers the AEA. Texas's arguments thus fail for the same reason that the D.C. Circuit articulated in *Bullcreek*—that § 10155(h) sets limits solely on the NRC's NWPA authority. 359 F.3d at 543.

Because the NWPA was enacted *after* the AEA, Texas's argument also conflicts with the rule against repeals by implication. *See Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (repeals by implication are "not favored" and are "a rarity" only found where "Congress' intention to repeal is

clear and manifest, or the two laws are irreconcilable" (cleaned up)). Rather than seeking to establish why the NWPA repealed the authority in the AEA, Texas contends that the NWPA merely "settled" a statutory question that may have been "unclear at that time." Br. 18. But if Congress's goal in § 10155(h) were only to clarify existing law, then it chose a poor vehicle to do so when it carved out "any other provision of law" and limited the provision to the NWPA itself.

Along those lines, there would be no need to state that the NWPA should not be read to "encourage" private away-from-reactor storage if, as Texas asserts, the AEA did not authorize away-from-reactor storage in the first instance. And it certainly would have been odd for the Supreme Court to recognize the NRC's authority to issue away-from-reactor storage licenses in 1983 if, as Texas necessarily suggests, Congress had *clearly* revoked that authority only a year earlier when it passed the NWPA. *See Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206, 217 (1983) (explaining that the Atomic Energy Commission, the NRC's predecessor, "was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, *possession* and use of nuclear materials" and recognizing, in the course of describing the NRC's authority under the AEA, that the NRC "has promulgated detailed regulations governing storage and disposal [of spent fuel] away from the reactor" (emphasis added) (citing 10 C.F.R. Part 72)).

Simply stated, Texas's extrapolation that a provision of law imposing conditions upon the construction of interim storage by the federal government means that, outside of these conditions, "the Commission cannot authorize *any* private storage facility," Br. 18, is simply a bridge too far. As the D.C. Circuit explained, "Given that Congress was aware of the NRC's regulations for licensing private away-from-reactor storage facilities, the plain language of § 10155(h) provides no support for [the] conclusion that Congress expressly disavow[ed] use of private away–from-reactor storage facilities or silently meant to repeal or supersede the NRC's authority under the AEA." *Bullcreek*, 359 F.3d at 542 (quotation marks omitted).

Nor do other provisions of the NWPA foreclose NRC's preexisting authority under the AEA, as Texas contends, Br. 19-22. While Texas asserts that the NWPA contains "extensive protections for state and local governments" with respect to the site-selection process, it fails to note that these provisions—42 U.S.C. §§ 10135-10138—address only a permanent repository constructed by the federal government pursuant to the NWPA. None of the provisions address the issuance of a license to a private party for spent fuel storage. The same is true for the other provisions of the NWPA, such as those in 42 U.S.C. §§ 10162 and 10172, that Texas contends "reinforce that the Commission lacks authority to license ISP's facility," Br. 20, 21. These are limitations on the *federal government's* ability to

construct either storage or disposal facilities. And, although the argument appears in Part II of Texas's brief, the same flaw applies to Texas's invocation of the NWPA's call for the "minimiz[ation] of the transportation of spent nuclear fuel" to federal storage facilities. Br. 33 (citing 42 U.S.C. § 10155(a)(3) and 42 U.S.C. § 10164(2)). Again, these provisions do not address the issuance of a license to a private party to store spent fuel.[24]

Finally, if, as Texas contends, there is no "rational explanation" for treating these private facilities differently under the law, Br. 20, then the fix lies in a statutory amendment, not in a rewriting by this Court of the legislation that Congress passed and the President signed. There are numerous plausible reasons for Congress attaching different conditions to federal, as opposed to private, spent fuel storage. Among other things, the AEA encourages the private development of electricity generation through nuclear energy. It is certainly consistent with this goal to permit private storage and to attach additional conditions on government

[24] We further note, with respect to Texas's arguments concerning transportation, that "minimization" does not mean "elimination." Thus, even if the need to minimize transportation governed the agency's licensing decision of a private facility licensed under the AEA, the mere fact that, hypothetically, a shipment of waste might travel from the Pacific Northwest to Texas before going to Yucca Mountain does not render issuance of the license arbitrary and capricious, as Texas asserts, Br. 33-35. The fact that some fuel somewhere might travel further east than its ultimate destination does not render the entire operation "irrational."

facilities, and there is no basis here to invalidate the distinction between private and government storage that Congress has drawn.

B. Even if the AEA were ambiguous, the Commission's interpretation is reasonable and entitled to deference.

It remains a bedrock principle of statutory interpretation that an agency's reasonably permissible interpretation of an ambiguous statutory provision, expressed with respect to a subject matter within its organic authority and in a manner through which Congress has contemplated it would communicate its reasoned and authoritative conclusions, is entitled to deference. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). This deference extends to "an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013).

In this case, the NRC's authority to issue licenses for parties to possess byproduct, special nuclear, and source material is clearly spelled out in the agency's organic statute, the AEA. 42 U.S.C. §§ 2073, 2092, 2111. Accordingly, the Court need go no further. But, even if the statute were reasonably susceptible to an alternate reading, the Commission's determination that it possesses this authority is entitled to deference because it was communicated as part of an adjudicatory proceeding conducted by the Commission in accordance with a

hearing process that Congress created and through which it expected the agency would express its conclusions.

In 2002, the NRC did precisely this when it interpreted the AEA to confirm its authority to license a privately-owned, away-from-reactor, interim storage facility for spent nuclear fuel. *See In the Matter of Private Fuel Storage, L.L.C.*, CLI-02-29, 56 N.R.C. 390 (Dec. 18, 2002). There, the NRC addressed Utah's argument that "the NWPA contemplates a comprehensive and exclusive solution to the problem of spent nuclear fuel and does not authorize private, [away-from-reactor] storage facilities." *Id.* at 395-96. Like Texas, Utah asserted that the language in § 10155(h)—"nothing in this Act shall be construed to encourage, authorize or require the private . . . use of any storage facility located away from the site of any civilian nuclear power reactor"—"overrides the Commission's general authority under the AEA to regulate the handling of spent fuel." *Id.* at 393. The agency rejected this argument, noting that the AEA has "always regulated the storage of spent fuel from commercial reactors pursuant to their general authority under the AEA," including its authority to regulate the constituent materials of spent nuclear fuel (i.e., special nuclear, source, and byproduct material). *Id.* at 395-96.

The Commission likewise concluded that nothing in the NWPA, including § 10155(h), purported to limit the agency's general authority under the AEA to

regulate spent fuel, and that § 10155(h) "contains no language of prohibition." *Id.* at 397. The Commission sensibly observed that Utah, like Texas here, "offers no explanation why Congress would see a need to add that it was not 'encouraging' or 'requiring' private, offsite storage if its decision not to authorize it in the NWPA were tantamount to an across-the-board prohibition." *Id.* at 398. And it rejected the idea that the federal government's authority to construct an interim storage facility under the NWPA could not coexist with the agency's authority to issue licenses for private parties to construct facilities of their own. *Id.* at 401-07. The Commission's decision also exhaustively analyzed the legislative history of the NWPA and determined that "Congress was fully aware that existing law allowed for private parties to store spent nuclear fuel at an [away-from-reactor] facility and made a conscious decision not to prevent that storage." *Id.* at 410; *see also id*. at 402 ("Congress was well aware that private offsite storage was lawful when it enacted the NWPA."); *Bullcreek*, 359 F.3d at 542 (reaching same conclusion concerning Congress's awareness).

Texas makes no effort to assert that any of these justifications for the Commission's conclusions are unreasonable. Indeed, it does not even refer to the Commission's longstanding explanation of its position or in any way grapple with the idea that the agency has been licensing away-from-reactor spent fuel storage facilities under the AEA for decades. Nor does it suggest that the Commission's

interpretation of its authority is somehow not sufficiently authoritative to warrant deference. *See Luminant Generation Co. v. EPA*, 714 F.3d 841, 850-51 (5th Cir. 2013) (deference warranted "if agency's decision is the result of a sufficiently formal and deliberative process" (quoting *Mead*, 533 U.S. at 230)).

Simply stated, the NRC's interpretation of its authority under the AEA represents, *at a minimum*, a permissible interpretation of the statute that Congress has given it the authority to administer. Accordingly, there is no basis to disturb its longstanding, reasonable, and amply supported conclusion that it is empowered to issue licenses for away-from-reactor spent fuel storage.

C. The facility is not subject to, and does not contravene, the NWPA.

1. The CISF is not a *de facto* repository.

Both Texas and Fasken assert that by issuing a license to ISP to construct and operate a CISF, the NRC has effectively licensed a repository and has therefore violated the NWPA's command that such a facility be built at Yucca Mountain, Nevada. Texas Br. 25-27; Fasken Br. 30. Their arguments are unavailing.

First, a repository is for permanent disposal, while the authorization that the NRC has issued in connection with the ISP license is for temporary storage "pursuant to the Atomic Energy Act." C.I. 130.3 (license). And the license issued to ISP has a term of 40 years, with the possibility of a single renewal term. *Id*;.

C.I. 130.2 (license preamble); 10 C.F.R. § 72.242. It is true, as Petitioners note, that progress toward a repository has stalled. But that does not mean, as Petitioners necessarily assert when they contend that the ISP facility is a *de facto* repository, that there will be no repository within 40, or (in the event of renewal) up to 80 years, or that fuel will not be moved from the ISP facility after the expiration of the term of its license. Petitioners resort to speculation when they assume, as an incontrovertible fact, that no progress on the issue can possibly be made before the dawn of the 22nd century and that spent fuel will inevitably stay there forever.

Second, contrary to Petitioners' assertions, the NRC has thoroughly analyzed the possibility that no repository will be constructed, and it has unequivocally stated that, in the event that no repository is available, a new storage facility would have to be licensed. The agency considered the no-repository scenario in the Continued Storage Generic EIS as a consequence of the D.C. Circuit's 2012 holding, in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012) (*New York I*), that the agency's prior attempt to account for the environmental effects of reactor operations, known as the Waste Confidence Decision, had not examined the environmental effects of failing to establish a repository. *See id.* at 1015. The agency's analysis in the Continued Storage Generic EIS analyzed the impacts of storing spent nuclear fuel across three different scenarios—one in which a

repository becomes available within 60 years of the expiration of the term of the facility being licensed; one in which a repository becomes available between 60 and 160 years after the expiration of the term of the facility being licensed; and one in which a repository does not become available at all. In these latter two scenarios, the NRC described a process in which spent nuclear fuel stored in storage casks would be transferred, using a dry transfer system, to a new (and separately licensed) facility approximately every 100 years. *See* Continued Storage Generic EIS at 1-13 to 1-15 (describing the three time frames), 2-20 to 2-24 (describing the dry transfer systems), 2-31 to 2-35 (describing the additional activities that would be required to replace storage systems at approximately 100-year intervals).

The agency's assessment of these impacts survived a comprehensive legal challenge by four states, a Native American community, and numerous environmental organizations. In *New York v. NRC*, 824 F.3d 1012, 1019-22 (2016) (*New York II*), the D.C. Circuit upheld the NRC's generic analysis of the impacts of storing spent fuel both on the site of existing reactors and at offsite facilities. The court held that the agency adequately studied the probability and consequences of a failure to site a permanent repository. *Id*. And the court found reasonable the NRC's assumption that spent fuel would be stored in dry casks that are replaced every 100 years. *Id.*

To be sure, it is *possible* that fuel shipped to the ISP facility will remain in Texas after the expiration of the ISP license. But the licensee would be required to seek a new license after the expiration of the existing one (and, in fact, the agency must prepare a new safety and environmental analysis in the event that a renewal is sought, with attendant opportunities for a hearing, *see* 42 U.S.C. § 2239(a); 10 C.F.R. § 72.42). And it is not a foregone conclusion that the licensee would seek (or that the NRC would allow it) to keep the fuel at that particular site. Again, Petitioners' speculation that the fuel will not go to a repository and will, instead, stay in Texas, does not convert a duly issued and term-limited license to store spent fuel in accordance with the AEA into a *de facto* repository issued in contravention of the NWPA. The agency's analysis of the possibility that no repository will be available after the expiration of the term of the ISP license and its identification of the steps that would need to be taken to license a new storage facility in the event of such a scenario, affirmed on judicial review, reflects its considered judgment and forecloses Petitioners' arguments to the contrary.

2. The agency has not authorized the storage of DOE-titled fuel.

Fasken's primary argument against the legality of the license is that the facility was originally conceived as a facility for the storage of spent fuel to which DOE, rather than private entities, own title, and that the issuance of the license therefore violates the NWPA. Br. 20-27. It criticizes (Br. 25) a provision of the

license stating that, "Prior to commencement of operations, the Licensee shall have an executed contract with the U.S. Department of Energy (DOE) or other SNF Title Holder(s) stipulating that the DOE or the other SNF Title Holder(s) is/are responsible for funding operations required for storing the material . . . ." C.I. 130.3 (license) at 3 ¶ 19. Its argument is unavailing for several reasons.

First, the NRC determined during the adjudicatory proceedings that the terms of the license did not violate the NWPA's prohibition. The Licensing Board explained, when it rejected Beyond Nuclear's contention on this issue, that ISP had *agreed* that "under current law, [it] may not contract for DOE to take title to private power companies' spent nuclear fuel. There is no credible possibility that such contracts will be made in violation of the law." *Interim Storage Partners LLC*, LBP-19-07, 90 N.R.C. 31, 59 (Aug. 23, 2019); *see also id.* at 59-60 (rejecting Sierra Club's contention to same effect for same reason).[25] And the Commission, reviewing the same argument on appeal, determined both that "ISP plainly could not rely on [contracts with DOE] to ensure its operating funds" because those contracts would be illegal and that "the proposed license is not premised on illegal activity because there is a lawful option by which ISP could fulfil the proposed

[25] As the Licensing Board explained, ISP acknowledged in response to written questions that "Applicant agrees that, absent new legislation, the DOE could not lawfully assume ownership of the spent nuclear fuel in the proposed interim storage facility." *Interim Storage Partners LLC*, LBP-19-07, 90 N.R.C. at 57.

license condition." *Interim Storage Partners LLC*, CLI-20-14, 92 N.R.C. 463, 468-69 (Dec. 17, 2020).

Fasken does not provide any reason to contest these common-sense conclusions. Nor does it explain why this Court should resolve the issue at all, given that the D.C. Circuit is reviewing the Commission's resolution of the contentions in which these arguments were adjudicated before the Commission in the first instance, in accordance with the hearing process contemplated by the AEA. *See* Brief of Beyond Nuclear, *Don't Waste Michigan v. NRC*, D.C. Circuit No. 21-1048 (Document No. 1939572) 17-19 (asserting that NRC "flouted the plain language of the NWPA" because "ISP's license explicitly allows ISP to contract with DOE for storage of DOE-owned spent fuel"); *see also Pac. Mar. Ass'n*, 827 F.3d at 1208 (review under *ultra vires* theory not appropriate unless party has been "wholly deprive[d] . . . of a meaningful and adequate means of vindicating its statutory rights.").

Second, while Fasken cites to the license *application* for the proposition that the original conception of the facility was that it would store DOE-titled fuel, Br. 24, it is the license, and not the application, against which the legality of the facility must be judged. Indeed, ISP amended its application to address concerns about the legality of the application. C.I. 31.2 (Revision 2 to License Application) at 1-1 to 1-2. And, as the Licensing Board and the Commission concluded, the

license granted by the NRC permits storage of spent fuel in a manner consistent with the NWPA—through the storage of spent fuel to which private entities retain title. Under the terms of the license, those private entities would be required to commit themselves by contract to fund operations of the facility. C.I. 130.3 (license) at 3 ¶ 19. Fasken asserts that this is an "unrealistic option," Br. 24, but Fasken's view that ISP's plan is not a viable business model provides no basis to deny issuance of the license.

Third, the license provision that Fasken challenges merely provides that the entities that own the spent fuel to be stored must enter into contracts pursuant to which they will provide financial backing sufficient to fund operations for the facility. C.I. 130.3 (license) at 3 ¶ 19. The reason for its inclusion is, plainly, to make sure that operational funding is guaranteed by the entities benefitting from the storage of the fuel, i.e., the fuel title holders. But there is no reason to believe either that DOE would enter into such a contract if it were illegal or that the NRC would permit such a contract to satisfy this license condition, particularly given the express acknowledgement of the Commission in an adjudicatory decision to the contrary. *Interim Storage Partners LLC*, CLI-20-14, 92 N.R.C. at 468-69 ("Because an illegal contract is unenforceable, ISP plainly could not rely on such contracts to ensure its operating funds."). And, of course, were DOE or NRC to take action in contravention of the NWPA, those actions would be subject to

judicial review and properly enjoined because they are contrary to law. *See* 5 U.S.C. § 706(2)(A).

III. The NRC complied with NEPA, the AEA, and the APA in issuing the license.

Both Texas and Fasken raise numerous arguments challenging the NRC's compliance with applicable law in issuing the license, which we address below. At the outset, however, we stress that the only conceivable basis for this Court to review the Petitions is under the questionable premise that compliance with exhaustion requirements imposed by Congress is not required when a party contests agency action as *ultra vires*; none of Petitioners' arguments addressed below falls into this category. *See* Argument Section I.B, *supra*. Accordingly, even if the Court concludes that it has jurisdiction to review the NRC's authority to issue the ISP license (and it should not), the arguments to which we respond below still are not properly before the Court. Even so, Petitioners' NEPA and APA assertions lack merit.

A. The agency's process complied with its own regulations and with NEPA.

Fasken contends that it was frozen out of the agency's process for developing an EIS, and that it lacked an opportunity to contest the agency's conclusions. Br. 14-18. In particular, it complains that the NRC "clos[ed] the administrative record, five months before publication of the NRC's draft EIS and

before the agency issued its notice soliciting public comments pursuant to NEPA." *Id.* at 14. Its arguments are unpersuasive.

It is true that the adjudicatory proceedings were completed before the publication of the draft EIS. But NRC regulations, repeatedly upheld on judicial review, plainly require NEPA contentions to be raised at the earliest possible time and, where possible, in response to the submission of the license applicant's Environmental Report. 10 C.F.R. § 2.309(f)(2); *see* discussion at page 9 *supra*. Indeed, Fasken's initial set of contentions challenging the agency's NEPA compliance were timely submitted. Further, Fasken subsequently moved for the admission of new or amended contentions based on its assertion that there was new information provided in the draft EIS that rendered the agency's NEPA analysis inadequate. Fasken Br. 15. And it has challenged the Commission's rejection of this argument in its brief to the D.C. Circuit. *See* Brief of Fasken, *Don't Waste Michigan v. NRC*, D.C. Cir. No. 21-1048 (Document No. 1939676) 9-22. Thus, Fasken had every opportunity to raise NEPA contentions before the Commission and to seek judicial review of the resolution of those contentions before the D.C. Circuit. NRC closed the adjudicatory proceedings before publishing the draft EIS because no party submitted timely and *admissible* contentions for adjudication, not because the NRC's process is improper. Fasken's collateral attack on the agency's NEPA process should not be countenanced here.

B. The NRC issued the license based on its rational conclusions concerning the safety of the facility.

1. The NRC properly considered the applicant's views in identifying the purpose and need for the facility.

Both Texas and Fasken ascribe to the NRC a motivation to issue a license to ISP based on a desire to clear land at existing reactor sites, and they assert that the agency's rationale for issuing the license to ISP is inconsistent with the criteria set forth in the AEA for the issuance of licenses. Texas Br. 27-33, Fasken Br. 31-35. Texas even goes so far as to assert that the NRC made a "decision to justify the entire license on this basis." Br. 30. Petitioners misstate the basis for the agency's decision to issue a license to ISP, as well as the agency's role in making decisions about how licensees should operate their businesses.

The NRC's primary role is to issue licenses and oversee licensees in a manner that ensures the adequate protection of the public from radiological hazards. *See In re Pacific Gas & Elec. Co.*, CLI-02-16, 55 N.R.C. 317, 342 (2002). The NRC does not compel persons to seek licenses or dictate how licensees should marshal their resources; its fundamental statutory mission is to determine whether licensees are operating, and license applicants have demonstrated that they will operate, safely. It is for this reason that the NRC stated in the final EIS that, when deciding whether to issue the license to ISP, the agency

would "ultimately base its decision on the protection of public health and safety." C.I. 125 at 8-1.

And the reason that the agency decided to issue the license to ISP is its determination that the facility would operate safely. The agency reached this conclusion in the Final Safety Evaluation Report for the facility, C.I. 134, where it documented that the application complied with the safety criteria in 10 C.F.R. § 72.40. The NRC reached these determinations after a comprehensive evaluation of the design of the facility; the site for the facility; the risk to the safe operation of the onsite radioactive material disposal facilities; the license applicant's qualifications based on personnel training and experience; the proposed operating procedures to protect health and to minimize danger to life or property; the applicant's financial qualifications; the applicant's quality assurance plan; the applicant's physical protection provisions; the applicant's personnel training program; the applicant's preliminary decommissioning plan; and the applicant's emergency plan. C.I. 134 at 18-1 to 18-2. And consistent with its Part 72 regulations, the NRC ultimately found that there was reasonable assurance that the activities authorized by the proposed license could be conducted without endangering the health and safety of the public and would not be inimical to the common defense and security. *Id.* at 18-2 (citing 10 C.F.R § 72.40(a)(13), (14)).

These findings, and not, as Texas would have it, the desire to clear land at existing reactor sites, represent the "basis" for the NRC's decision to issue ISP a license.

Of course, the agency also needs to study the environmental impacts of, and reasonable alternatives to, issuance of the license that has been sought. These are the agency's obligations under NEPA. And the "purpose and need" for the facility—which the NRC must identify in order to perform its NEPA analysis—properly represents the agency's recognition of the reason that the license applicant sought authority to construct the facility at issue. Specifically, the NRC recognized ISP's plan to provide an option to the holders of spent fuel to move fuel offsite, so as to facilitate operations for nuclear power plants that might need space for their existing spent fuel (since onsite storage is limited by space and regulatory constraints), and to permit decommissioned reactors to restore their sites to a level that would permit other uses. C.I. 125 at 1-3.

Texas correctly notes that the NRC has no jurisdiction over land use. Br. 29. But the NRC is not regulating land use or expressing a preference as to where spent fuel should be stored. Instead, as part of its NEPA analysis, it recognized the *option*, proposed by a license applicant, for power plant operators to use their own property in a manner that is most economically beneficial to them. And contrary to Texas's arguments, Br. 28-29, such goals are fully consistent with the AEA's goal of harnessing nuclear energy for the generation of electricity. *See* 42 U.S.C.

§§ 2011, 2012. Indeed, operating plants would be forced to shut down if they run out of onsite storage capacity. *See, e.g.*, *Minnesota v. NRC*, 602 F.2d 412, 414 (D.C. Cir. 1979) (explaining that nuclear power plants "were designed in contemplation of off-site shipment of spent fuel" and "would be forced to shut down when the limited on-site storage capacity was filled"). Thus, providing another option for spent fuel storage plainly facilitates the operation of existing reactors. In addition, the option of being able to restore land for other uses, once a site has been decommissioned, encourages new power plant applicants to enter the market.[26]

In a NEPA analysis, it is proper for a permitting agency like the NRC to consider the purpose and need for the facility from the applicant's perspective. The NRC does not "need" to license the facility, and it is agnostic as to whether fuel is stored at reactor sites or at a consolidated location—its focus is on safety. But as this Court and others have recognized, the agency must consider the views of the applicant in evaluating the purpose and need for a proposed license. *See, e.g.*, *Louisiana Wildlife Fed'n, Inc. v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985) (under guidelines promulgated by EPA, "not only is it permissible for the Corps to

[26] We stress in this regard that promoting the use of nuclear energy for the generation of electricity is a goal underlying the AEA's enactment. But responsibility for this pursuit is assigned under the Energy Reorganization Act to DOE. *See* 42 U.S.C. § 5813. By contrast, the NRC's role is itself non-promotional; it is the safety regulator.

consider the applicant's objective; the Corps has a duty to take into account the objectives of the applicant's project. Indeed, it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable."); *see also City of Grapevine, Tex. v. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) ("Per then-Judge Thomas, where a federal agency is not the sponsor of a project, 'the Federal government's consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project. In formulating the EIS requirement, the Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be.'" (quoting C*itizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991)).

Fasken cites *Environmental Law & Policy Center v. NRC*, 470 F.3d 676 (7th Cir. 2006), for the proposition that courts should not "blindly adopt[]" a license applicant's goal. Br. 5. We agree. But the NRC has not blindly adopted ISP's goals, as Petitioners suggest. The agency has recognized that the owners of spent fuel might seek to capitalize upon the option of storing fuel on the site of an already-existing waste disposal facility so as to facilitate continued reactor operations. And it has recognized that these owners may at some point wish to use the land on which fuel is stored. Thus, it reasonably defined the purpose and need for the project, for purposes of its NEPA analysis, in reference to these goals. In

Environmental Law & Policy Center, the court endorsed exactly this approach, when the agency considered the purpose and need for the facility in light of the nature of the license applicant's business operation and the scope of its authority. 470 F.3d at 683-84 (endorsing the agency's definition of the purpose of an application for a site permit for a reactor as "baseload energy generation" where the applicant was a private company engaged in generating energy for the wholesale market, and rejecting petitioners' argument that agency should have considered alternatives that license applicant was "in no position to implement").

Finally, Texas asserts that it is speculative that reactor sites will in fact be decommissioned, and that, in any event, the process of decommissioning and the construction and operation of the ISP facility will have environmental consequences that undermine what Texas contends is the "agency's stated restoration goal." Texas Br. 30-33; *see also* Fasken Br. 35. These assertions are wholly unpersuasive. As to the first, numerous reactors have shut down in recent years. Many have removed everything from their reactor sites other than spent fuel. *See, e.g.*, *Yankee Atomic Energy Co. v. United States*, 113 Fed. Cl. 323, 328 (2013) (describing status of plants owned by three separate utilities). And many have submitted decommissioning plans calling for the accelerated dismantlement of reactor sites. *See, e.g.*, *FirstEnergy Cos.*, CLI-21-02, 2021 WL 194893 (Jan. 15,

2021) (reviewing transfer of license to company that planned to complete decommissioning "years ahead of" prior projection).

As to the second, the fact that the decommissioning of reactor sites and the construction and operation of the ISP facility will have consequences is of no moment. Reactor sites will eventually be decommissioned, so there are no environmental consequences avoided, as Texas suggests, in delaying the impacts from now until a later date. Further, all that NEPA requires is that the agency analyze and disclose the anticipated impacts of the proposed facility. *See Spiller v. White*, 352 F.3d 235, 238 (5th Cir. 2003). The NRC has done so here. And, as explained above, the agency's "goal" is not restoration of land; it is to ensure the safety of the facilities at which the reactor licensees choose to store their spent fuel. The purpose and need that the agency recognized is consistent with the AEA and with this goal, and neither Petitioner demonstrates otherwise.

2. The agency's NEPA analysis did not improperly or inaccurately analyze economic considerations.

Texas contends that the agency "let economic considerations override statutory safety and environmental factors" and that the agency was improperly influenced by economic benefits. Br. 37. Its arguments are unavailing.

First, the NRC's NEPA-implementing regulations *require* it to perform an analysis of the costs and benefits of the proposed project. *See* 10 C.F.R. § 51.71(d); *see also Sierra Club v. Sigler*, 695 F.2d 957, 978 (5th Cir. 1983). The

agency's analysis of these benefits is part and parcel of this undertaking. The agency issued the license because it determined that the facility could be operated consistent with the public health and safety and the common defense and security. C.I. 134 at 18-1 to 18-2. Consistent with NEPA, however, it also weighed the costs and benefits of the proposal. C.I. 125 at 8-1 to 8-12. The agency prepared the EIS in accordance with its regulatory obligations, and Texas identifies no error in the fact that the agency's NEPA analysis included a consideration of costs and benefits.[27]

Nor is there any basis to conclude, as Texas asserts here, that the agency's analysis "was riddled with errors and inconsistencies." Br. 38. Primarily, Texas's criticisms focus on the assumption that the facility will operate for 40 years, which Texas contends is inconsistent with the assumption that a permanent repository would be available by 2048. *Id.* at 39 (asserting that, as a consequence, the benefits of the facility have been overstated). But the NRC did not assume that all fuel would be shipped to a repository by 2048; it stated that it "expects the SNF stored at the proposed facility would have been shipped to a permanent geologic

---

[27] Texas asserts that the agency may employ economic considerations to impose a requirement when imposing a standard more stringent than "adequate protection." Br. 38 n.14 (citing *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 114 (1987)). This is true but irrelevant. The agency has evaluated the costs and benefits of the ISP facility as part of its NEPA analysis and not, as Texas suggests, in lieu of a determination that the ISP facility can be constructed and operated safely.

repository" by the end of the term of the license (which is 2061, even without license renewal). C.I. 125 at 2-2. And the fact that a repository could be *available* by 2048 does not mean that all fuel will be sent there immediately, such that no additional operations at the ISP facility will be required after that date. Indeed, even if a repository were initially available in 2048, the process of shipping fuel to a repository will take time. *See, e.g.*, C.I. 125 at 4-23 (forecasting shipments of fuel from the facility to a repository over a 17-year time frame). The conservative assumption that NRC employed in formulating its analysis—which lies within the core area of the agency's expertise—was reasonable, which is all that NEPA requires. *See Spiller*, 352 F.3d at 243 ("government agencies—and not the federal courts—are the entities NEPA entrusts with weighing evidence and reaching factual conclusions"); *Sabine River Auth. v. Dep't of Interior*, 951 F.2d 669, 678 (5th Cir. 1992) (agency has discretion to select or reject from conflicting evidence and may rely on the reasonable opinions of its own qualified experts).

Nor are Texas's efforts to "flyspeck" other parts of the agency's economic analysis compelling. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 308 (D.C. Cir. 2013); *see also Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006) (evaluating state's criticisms of agency's identification of transportation impacts for spent fuel repository and rejecting invitation "to look[] for any deficiency, no matter how minor"). Thus, while Texas asserts (Br. 39-40) that the agency

improperly assumed that operation and maintenance costs would remain constant, it ignores the passive nature of the licensed activity (i.e., permitting sealed spent fuel storage casks to sit while awaiting further disposition). C.I. 125 at xxv, 4-4, 4-27, 4-28, 4-73 (recognizing the passive nature of the storage facility and projecting that number of workers would stabilize after completion of construction). It is certainly reasonable for the agency to assume, as a function of its technical expertise, that the fixed overhead costs of maintaining and operating a storage facility do not vary as a function of the amount of fuel being stored, and Texas provides no argument to the contrary. And while Texas complains that the agency refused to quantify the costs of infrastructure upgrades prior to shipment, Br. 40, it ignores the agency's finding that the expenditure was not only difficult to establish and would vary from site to site, but also "would be a common need for both the proposed CISF and the No-Action alternative" and would therefore not alter the comparison. C.I. 125 at 8-11.[28]

---

[28] Texas cites (Br. 40-41) to page C-13 (C.I. 125 at C-13) of the final EIS to assert that the NRC has somehow been inconsistent in its treatment of storage costs. But the calculation it challenges merely phases out costs that reactor sites allocate to fuel storage over a period of years as a means of ensuring an apples-to-applies comparison between the proposed action and the no-action alternative. This methodology is perfectly reasonable and certainly not evidence of a "dramatic underestimate" of the costs of the ISP facility, as Texas asserts (without providing any suggestion of how the agency might have improved upon its calculation or any explanation of how the agency's choice of accounting conventions evidences a lack of reasoned decisionmaking). Texas also cites (Br. 40) to pages C-18 to C-19 of the EIS to assert that the agency has improperly forecast the timeframe in which

3. The agency properly evaluated the safety and environmental impacts of transporting spent fuel.

To the extent that Texas challenges the agency's conclusions that the shipments of spent fuel will be conducted safely, Br. 35-37, its arguments are unavailing for two reasons.

First Texas's free-ranging assault on the agency's judgment regarding fuel shipment safety reflects, at most, a disagreement with a technical agency on matters within the agency's core expertise rather than a demonstration that the agency's conclusions are somehow flawed. Indeed, Texas fails to marshal any record evidence that contravenes, let alone demonstrates the plain error of, the agency's expert determination that the "accidental release of canistered fuel during transportation would not occur under the most severe impacts studied, which encompassed all historic and realistic accident scenarios." C.I. 125 at 8-6. Nor does Texas offer any reason to contest the agency's conclusion that, with respect to non-canistered fuel, "99.999999 percent of all accident scenarios would not lead to either a release of radioactive material or a loss of shielding." *Id.* The agency thoroughly analyzed the radiological and non-radiological impacts from

---

reactors storing fuel at ISP would be decommissioned, but the particular table it cites merely represents one of two scenarios (one in which no additional reactors are shut down, and one in which additional reactors are shut down, thus explaining the cessation of operating costs) that the agency considered in order to determine the cost of the no-action alternative. C.I. 125 at C-15 to C-22.

transportation accidents, *see* C.I. 125 at 4-17 to 4-21, and, whether framed as a NEPA or an AEA challenge, Texas's arguments are unpersuasive,

Second, Texas misstates and the law and ignores the agency's analysis when it challenges NRC's reliance upon its comprehensive regulatory scheme governing the transportation of spent fuel to reach a conclusion concerning the environmental impacts of moving spent fuel (and the likelihood of an accident) (Br. 36 n.13). It is certainly appropriate for the NRC to consider the restrictions contained in its regulatory scheme, and to presume adherence to them, when evaluating impacts, regardless of how "complex" or "voluminous" the regulations are. *See, e.g.*, *New York II*, 824 F.3d at 1021 (upholding the agency's determinations concerning the risks of leaks from spent fuel pools in light of NRC regulations requiring leak detection).

C. The agency reasonably considered the timing of the availability of a permanent repository.

Fasken asserts that the agency has made inconsistent and unreasonable assumptions concerning the time when a repository will become available, and it contends that the agency's lack of "good faith objectivity" distorts its environmental analysis. Br. 28-31. But the NRC performed a detailed assessment concerning the feasibility and likelihood of repository availability, including a thorough analysis of scenarios in which a repository does not become available. Moreover, because the agency codified its analysis in a rulemaking that has

survived judicial review, Fasken cannot challenge the agency's conclusions without first seeking relief from the Commission.

In response to the D.C. Circuit's *New York I* decision, the NRC engaged in an extensive rulemaking proceeding to evaluate when a repository might reasonably become available. Based on technical data available to it and historical and international experience concerning the time it takes to license and construct a facility, the agency determined that a facility could reasonably be expected to be available by 2048, and it determined that a repository within what it defined as the short-term timeframe was the "most likely" scenario. *See* Continued Storage Generic EIS at xxx, 1-13 to 1-15, B-1 to B-9. This analysis, which was codified by rule at 10 C.F.R. § 51.23 so that it could serve as the NEPA analysis for future reactor and fuel storage licensing decisions, was the subject of extensive litigation and was affirmed on review by the D.C. Circuit. *New York II*, 824 F.3d at 1020 (holding that "the NRC adequately considered both the probability and consequences of failure to site a permanent repository for spent nuclear fuel").

Notably, the agency did not stop with its analysis after determining that a repository in the short-term timeframe both was feasible and represented the most likely scenario. Instead, consistent with D.C. Circuit's ruling in *New York I*, the NRC analyzed scenarios in which a repository would *not* become available in the short-term timeframe. *New York II*, 824 F.3d at 1020 ("The agency provided a

qualitative analysis of the likelihood of failure to site a repository and considered the reasonably foreseeable impacts of that scenario." (citations omitted)). And its evaluation of these scenarios has been incorporated by rule into the agency's analysis of storing spent fuel at the ISP facility. *See* 10 C.F.R. §§ 51.23; § 51.97(a); C.I. 125 at 1-7. Thus, contrary to Fasken's assertions, Br. 31, the agency's NEPA analysis accurately accounts for scenarios both with and without a repository.[29]

Fasken offers no basis to depart from *New York II*, which upheld the agency's codification of its conclusions concerning the availability of a repository and the consequences of not having one. And to the extent Fasken disagrees with the Commission's identification of the impacts attributable to questions concerning repository availability, either generally or in connection with the issuance of the ISP license, it had two options. First, Fasken could have filed a petition for rulemaking with the Commission, including seeking a stay of any associated licensing proceedings. *See* 10 C.F.R. § 2.802(a),(e). Second, Fasken could have sought a waiver of the agency's rule codifying the impacts contained in the

[29] Fasken also suggests at the conclusion of its arguments in this section that the agency "refus[ed]" to consider the impacts of shipping fuel to a repository. Br. 31. But the agency did analyze that issue in both the ISP EIS and the Continued Storage Generic EIS. C.I. 125 at 3-9 (concluding that prior analyses performed by DOE and by the NRC bounded and were representative of the impacts of transporting fuel to a repository); *id.* at 4-21 to 4-24 (analysis of impacts to workers and public); Continued Storage Generic EIS at 6-9 to 6-10, 6-52 to 6-53.

Continued Storage Generic EIS, *see New York II*, 824 F.3d at 1021-22 (discussing process for obtaining waiver under 10 C.F.R. § 2.335(b)). What Fasken cannot do is what it has done here—skip the agency's processes for obtaining relief from existing rules that codify the impacts of storing spent fuel and ask the Court to invalidate an NRC analysis that was arrived at after an extensive notice-and-comment rulemaking and that has already been subject to judicial review.

D. The agency's analysis of alternatives was reasonable.

1. The agency properly confined its analysis to alternatives that are consistent with the purpose and need for the facility.

Fasken asserts that the agency improperly eliminated alternatives to the ISP facility, Br. 31-47, but that is incorrect.

We begin by emphasizing that the propriety of the alternatives evaluated was the subject of extensive contested proceedings before the Licensing Board and the Commission. Indeed, groups contended before the agency that "[t]here are at least four alternatives to the proposed CISF project which are neither recognized nor addressed in the Environmental Report, contrary to NEPA requirements." *Interim Storage Partners, LLC*, LBP-19-07, 90 N.R.C. at 97-99. This contention was not admitted for reasons that the Licensing Board and the Commission explained. *Id.*; *see also Interim Storage Partners,* LLC, CLI-20-14, 92 N.R.C. at 484-86. And the Commission's resolution of these issues is currently the subject of the Petitions for

Review pending before the D.C. Circuit. *See* Brief of Don't Waste Michigan and Sierra Club, *Don't Waste Michigan v. NRC*, D.C. No. 21-1048 (Document No. 1939761) 16-18 (section entitled "The NRC Allowed an Inadequate Examination and Evaluation of Alternatives."). Fasken should not be permitted to raise the alternatives issue here, when it had the opportunity to raise the issue before the Commission but did not, the issue was raised before the agency by others, and the Commission's decision is the subject of judicial review in a proceeding to which Fasken is a party.

Even if the Court reaches them, Fasken's arguments lack merit. Fasken contends that the agency improperly eliminated alternatives to constructing the ISP facility, such as using "hardened onsite storage" at reactor sites. Br. 37-40. But the agency reasonably concluded that onsite storage options would not satisfy the purpose and need for the facility, which was to afford the owners of spent fuel the option of storing fuel *offsite* so as to permit continued reactor operations and, upon completion of the decommissioning process, the use of the land for other purposes. C.I. 125 at 1-3. For the reasons explained in Section III.B.1 *supra*, the NRC did not err in identifying the purpose and need for the facility in this manner. Even Fasken's cited authority confirms that it is appropriate for an agency to identify the purpose and need for, and the alternatives to, a license applicant's proposal in light of the facility and the nature of the applicant's business. *See Envtl. Law & Policy*

Ctr., 470 F.3d at 683-84. That is what the agency did here. And the agency reasonably and properly eliminated, after a preliminary screening, those alternatives that did not further the stated purpose of the license. *See Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 177 (5th Cir. 2000).

Nor are Fasken's arguments (41-47) referencing Private Fuel Storage or the proposed Holtec International fuel storage facility compelling. In 2006, the NRC granted Private Fuel Storage a license, but it has not constructed a facility. More recently, Holtec applied for an NRC license for a fuel storage facility, which is still under consideration by the agency. Fasken apparently asserts that these facilities should have been included as alternatives to issuance of a license to ISP. But Fasken provides no support for the idea that the NRC should be in the business of choosing one storage facility to license, as opposed to another. The question for the alternatives analysis is what alternatives ISP, as the license applicant, "is in a position to implement." *Envtl. Law & Policy Center*, 470 F.3d at 683-84; *cf. City of Shoreacres v. Waterworth*, 420 F.3d 440, 450-51 (5th Cir. 2005) ("NEPA requires only that the [agency] consider alternatives relevant to the applicant's goals and the [agency] is not to define what those goals should be." (cleaned up)). And contrary to Fasken's assertion (Br. 44), the agency *did* consider the potential environmental impacts of the proposed Holtec facility throughout its analysis of

the cumulative impacts associated with the ISP facility. C.I. 125 at 5-6, 5-7, 5-18, 5-20, 5-33, 5-49, 5-51.

2. The agency's selection and discussion of a site for the facility was reasonable.

In addition to asserting that the NRC should have evaluated other forms of spent fuel storage, Fasken also asserts that the agency "blindly accepted ISP's site selection process, … unreasonably precluding [the] evaluation of alternative site locations to mitigate potential impacts." Br. 47. But Fasken neither points to any errors in the agency's analysis nor provides any reason to believe that the agency's technical determination that other sites were not environmentally preferable is somehow erroneous and not entitled to deference. *See* C.I. 125 at 2-23 to 2-25.

Fasken also contends that the agency "blatantly disregarded fierce oppositions from the governors [of Texas and New Mexico] and host communities" in selecting a facility site. Br. 49. This is incorrect. The agency engaged in extensive public outreach and dialogue with affected communities and government officials to understand and address public concerns about the project and the potential site-specific impacts. C.I. 125 at 1-4 to 1-6, 1-9 to 1-14. And at the time that the NRC was conducting the site-selection process, the proposed facility had the support of both the New Mexico and Texas Governors, as well as Andrews County, where the facility is to be located. The Governor of Texas voiced support for storing spent nuclear fuel in Texas, C.I. 88.3 (Environmental

Report Rev. 3, Part 1) at 2-10, and the Commissioners of Andrews County unanimously approved a resolution in support of establishing a consolidated interim storage facility, C.I. 88.4 (Environmental Report Rev. 3, Part 2) at Attachment 1-1. Further, as ISP described in its Environmental Report, New Mexico's Governor "voiced her support for a consent based approach to locate a CISF in southeastern New Mexico" in a letter to the Secretary of Energy. C.I. 88.3 (Environmental Report Rev. 3, Part 1) at 2-10*; see also* C.I. 88.4 (Environmental Report Rev. 3 Part 2) at Attachment 2-1 ("This letter is to inform you of my support of the community leaders who continue to spearhead the effort to bring a consolidated interim storage facility for spent fuel to southeastern New Mexico. The recent decision by your administration to adopt a consent-based approach for waste management should highlight areas such as southeastern New Mexico where there is broad support in the region for such an endeavor."). In any case, and as the agency explained in a response to comments submitted to the agency on the draft EIS, "[a]bsent Congressional direction to do so, the NRC may not deny a license application for failure to conduct consent-based siting." C.I. 125 at D-25.

Next, Fasken provides an extended argument based upon an analysis prepared by its consultant, Great Ecology. Br. 51-55 (relying on C.I. 128). Great Ecology criticized the use of "variable radii," (i.e., different-sized areas to measure impacts of the facility upon various resource areas) for environmental and

cumulative impact analysis, and Fasken contends that this flaw prevented an accurate assessment of the project's site-specific impacts. But Fasken submitted the Great Ecology analysis long after the deadline for submitting comments on the draft EIS (and, in fact, after issuance of the final EIS), and the agency was under no obligation to consider it. *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1059 (D.C. Cir. 2001); *see also Reytblatt v. Nuclear Regulatory Comm'n*, 105 F.3d 715, 723 (D.C. Cir. 1997) (holding that agency was not required to address comments that had been submitted two months after the close of the comment period). Moreover, Fasken makes no effort to explain why the alleged deficiencies in the environmental analysis could not have been presented to the agency in the form of contentions as part of the adjudicatory process. [30]

Nor do Fasken's arguments present anything other than hyper-focused technical disagreements with the site-specific analyses that the agency did perform. Fasken criticizes the agency's use of "varying radii" to measure different categories of cumulative impacts, but it fails to explain why this approach is flawed. The use of varying radii merely reflects the commonsense notion that a facility may affect different resources in ways that vary in their geographic scope. Beyond being late and presented outside the adjudicatory context, Fasken's

---

[30] Nor does Fasken contend that the report contained new and significant information that required supplementation of the EIS prior to license issuance. *See Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 373-74 (1989).

argument fails because the NRC took a hard look at the potential environmental impacts of the project, and Fasken's narrow technical argument does not undercut that analysis. *See Mississippi River Basin Alliance*, 230 F.3d at 174.

E. Petitioners' remaining arguments under NEPA are unavailing.

1. The NRC properly considered the potential impacts of accidents of all forms but is not required to evaluate risks, such as terrorist attacks, attributable to superseding causes.

Texas's final argument is that the agency failed to address the risks from a potential terrorist attack. Texas claims that NEPA requires the agency to analyze "the threat of a potential terrorist attack on the ISP facility," and that the agency improperly "declined to consider the potential for a terrorist attack" in the EIS. Br. 41-42. But Texas is incorrect when it asserts that NEPA requires such an analysis.

The United States Court of Appeals for the Third Circuit recognized as much in *New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132 (3rd Cir. 2009), when it rejected this argument based on Supreme Court precedent. Specifically, the Third Circuit heeded the Supreme Court's instruction that, in considering the scope of impacts that must be addressed as part of a NEPA analysis, courts should "draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Id.* at 139 (quoting *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004)); *see also*

Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983) (analogizing the requirement to concept of proximate causation from tort law). As the Third Circuit explained, addressing the risks from a terrorist attack—the consummate example of an intervening event—lies far beyond the "reasonably close causal relationship" that NEPA requires between a major federal action and a potential impact. *See New Jersey Dep't of Envtl. Prot.*, 561 F.3d at 140 (explaining that an airborne terrorist attack would require at least two intervening events—the actions of a third-party criminal and the failure of all government agencies charged with preventing a terrorist attack—and concluding that a terrorist act should be considered a "superseding cause" based upon five of six factors identified in the Restatement (Second) of Torts)).

In effect, Texas's position presupposes that the failure of all federal and state law enforcement agencies to prevent a willful criminal attack on the ISP facility is a reasonably foreseeable consequence of the NRC's licensing decision. And in arguing that the agency must evaluate the environmental risk of such an event, it suggests that the agency must weigh in its decisionmaking process the likelihood that other government agencies will fail to perform their statutory responsibilities. But as the Third Circuit recognized, the NRC has no authority over the actions taken by the responsible government agencies to monitor and prevent terrorist attacks, and the aims of NEPA would not be served by requiring the agency to

weigh these considerations outside the context of its more general analysis of accidents. *See id.* at 561 F.3d at 141-42; *see also City of Dallas, Tex. v. Hall*, 562 F.3d 712, 719 (5th Cir. 2009) ("'Reasonable foreseeability' does not include 'highly speculative harms' that 'distort[ ] the decisionmaking process' by emphasizing consequences beyond those of 'greatest concern to the public and of greatest relevance to the agency's decision.'" (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355-560)).

Texas nonetheless suggests that the case should be governed by *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), and it attempts to distinguish *New Jersey Department of Environmental Protection* because *Mothers for Peace* involved a new facility whereas *New Jersey Department of Environmental Protection* involved the renewal of an existing license. However, this distinction was not the basis for the Third Circuit's decision. The Third Circuit's determination—which it deemed "more central" to its analysis than the fact that *Mothers for Peace* involved a new facility license—was that the Ninth Circuit had improperly rejected the "reasonably close causal relationship" test that the Supreme Court adopted in *Metropolitan Edison* and *Public Citizen*. 561 F.3d at 142-43 (observing "no other circuit has required a NEPA analysis of the environmental impact of a hypothetical terrorist attack" and citing cases from the Second, Third, Eighth, and D.C. Circuits for this proposition).

Nor is Texas's attempt (Br. 44) to fit this case within the strictures of *Metropolitan Edison* persuasive. While Texas contends that that case "did not purport to establish a rule about what kinds of risks the Commission must consider," that is exactly what the Supreme Court did when it ruled that an agency need not consider effects that are "too far removed" from the major federal action to be covered by NEPA. 460 U.S. at 777; *see Public Citizen*, 541 U.S. at 767 ("*As this Court held* in [*Metropolitan Edison*], NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause." (quoting *Metropolitan Edison*, 460 U.S. at 774) (emphasis added)).

Texas likewise asserts (Br. 44) that this case is on all fours with the counterfactual scenario that Supreme Court hypothesized in *Metropolitan Edison*, wherein the Court suggested that it would be "an entirely different case" if the agency were being asked to "consider effects that will occur if a risk is realized." 460 U.S. at 775 n.9. But the "realized risk" that the Supreme Court contemplated in *Metropolitan Edison* was a potential accident at the reactor site, which we agree *is* a reasonably foreseeable consequence of authorizing reactor operations and well within the scope of the agency's licensing authority. Likewise, here, the agency *did* analyze the effects of potential accidents in its NEPA analysis for the ISP facility. C.I. 125 at 4-94 to 97. What it has not done in the site-specific EIS that it prepared for the ISP facility is attempt to describe the effects of an accident that is

attributable only to the deliberate, criminal, and inherently unpredictable action of a third party.

Accordingly, the agency included an analysis of accidents in its site-specific EIS for the ISP facility. This includes a description of the four types of "design basis" events, i.e., those events and accidents "for which the facility must be designed to ensure the capability to prevent or mitigate the consequences of accidents that could results in potential offsite exposures," as well as an analysis of transportation accidents. *Id.* at 4-17 to 4-19, 4-94 to 4-97. And, with respect to severe accidents, the agency noted that NRC's approval of the license was contingent upon its analysis of such infrequent and extremely unlikely events as explosions, fires, earthquakes, floods, lightning, tornado missiles, burial of casks under debris, cask tipovers and drops, complete blockage of storage cask air inlets and outlets, and accidents at nearby sites. *Id.* at 4-96. The agency thus determined that the safety requirements around which the facility is designed would be sufficient to ensure that the environmental effects of such events would be small. *Id.* at 4-97; *cf. New York II*, 824 F.3d at 1021 (relying on assessment of impacts of spent fuel pool leaks in light of NRC regulations requiring leak detection). Given that the agency's evaluation encompasses consideration of the same types of natural and man-made scenarios (such as fires, explosions, and cask tipovers) as

might reasonably be expected as a consequence of a terrorist attack, the agency's evaluation provides a sufficiently thorough evaluation of these issues.

In addition to the severe accident scenarios covered in the Final EIS for the ISP facility, NRC also has evaluated the threat of terrorism at dry storage facilities on a generic basis, including identifying the "catastrophic" effects of the detonation of an improvised nuclear device. *See* Continued Storage Generic EIS at 4-94 to 4-97, 5-58 (describing anticipated short-term deaths caused by shockwaves and heat, and longer-term damage due to radiation exposure). And the agency concluded on a generic basis that the environmental risk of a terrorist attack at a storage facility would be small because the potential impacts, though conceivably large (and otherwise evaluated), are unlikely to occur. *See id.* at 4-96 (evaluating the threat of terrorist attacks and concluding that the probability of a successful impact would be numerically indeterminate but very low because of the physical protection systems that licensees are required implement and the robust nature of dry cask storage systems); *cf. New York,* 824 F.3d at 1021 (upholding NEPA analysis that relied on compliance with regulatory obligations to assess risk); *New Jersey Dep't of Envtl. Prot.*, 561 F.3d at 134 (finding that site-specific analysis of severe accidents coupled with generic analysis of sabotage risks in NRC's generic analysis "together provide both generic and site-specific analyses of potential environmental impacts at [the reactor site] arising from terrorist attacks.").

Furthermore, the agency's environmental analysis in the FEIS is confirmed by the safety analysis that the agency performed.[31] The agency thoroughly evaluated the safety implications of accidents (including the types of events that might reasonably be expected to occur as a result of a terrorist attack) such as fires and explosions; building structural failure, heatup and blockage of air inlets and outlets; dropped and tipped-over casks; earthquakes; lightning; floods; tornado wind and missiles; and accidents at nearby sites. C.I. 134 at 16-1 to 16-15. And the agency concluded that the design of the ISP facility, including the use of the specified storage systems proposed to be used, met the NRC's stringent requirements for handling the consequences of these potential accident scenarios without endangering public health and safety. *Id.* Texas provides no basis to question any of the agency's safety conclusions.

To be sure, Texas does attack the agency's incorporation of prior generic analyses as part of its evaluation of impacts. Br. 45 (asserting that Texas presents unique vulnerabilities because of the oil industry and its proximity to the Mexican border). But it fails to heed the very authorities it cites, which confirm that the agency's hearing process is the proper forum in which challenges to the

[31] We do not contest Texas's assertions (Br. 45) that the agency's obligations under the AEA and NEPA are separate. But the agency does not err when, as here, it assesses the potential environmental impacts of an accident in part by relying upon its comprehensive safety analyses.

applicability of generic analyses should be raised. Indeed, Texas relies on the agency's need to consider "site-specific factors that differ from plant to plant." Br. 45-46 (citing *New York I and II*). But it fails to note that the D.C. Circuit specifically contemplated in *New York II* that this consideration would take place in adjudicatory proceedings, including the Commission's allowance in 10 C.F.R. 2.335(b) for an adjudicatory participant to assert that a generic analysis set forth in a rule should be waived due to special circumstances. 824 F.3d at 1022-23. If Texas were seriously concerned about the agency's use of generic analyses to satisfy its obligations under NEPA, it should have either (1) raised such an argument in a contention before the agency; or (2) invoked the agency's waiver procedure to demonstrate that the rules upon which the agency has relied to invoke these analyses are not applicable. But having eschewed this hearing opportunity, Texas cannot now claim to be injured by the agency's reliance upon the analyses that it previously performed.

2. The impacts of the license do not depend upon ownership of the fuel being stored.

Fasken asserts that, because the license would (upon a change in legislation) permit the storage of DOE-titled fuel, the NEPA analysis that the agency performed is inaccurate. In particular, it asserts that "the impacts will be different, depending on whether [the owner of the spent fuel] is the DOE or a private person." Br. 27.

This argument is unpersuasive. Fasken provides no support for its assertion that the answer to the "who is going to own the fuel" question affects the reasonably foreseeable impacts of the construction and operation of the facility. Indeed, the license requires a financial commitment from whoever owns the fuel, irrespective of whether that entity is a public or private entity. And the pages of the EIS that Fasken cites (Br. 27) do not suggest otherwise. Page 2-22 of the EIS merely states that the characteristics of a DOE-constructed fuel facility are not yet known, C.I. 125 at 2-22; that statement in no way indicates, as Fasken suggests, that the agency cannot identify the impacts of the impacts of storing DOE-titled spent fuel at a private facility. And page D-131 merely states that the owner of the spent fuel will have to provide funding to support facility operations. *Id.* at D-131. It is not apparent why Fasken cites other comment responses in support of its position, but the impacts on the "human environment" that the agency identified in the EIS pursuant to its obligations under NEPA plainly do not depend on the purely administrative issue of who owns title to the fuel being stored.

CONCLUSION

The Court should dismiss the Petitions for Review for lack of jurisdiction because Petitioners lack Article III standing and because they failed to comply with the AEA's and Hobbs Act's exhaustion requirements. Even if the Court were to hold that Petitioners have standing and that the *ultra vires* exception is valid and applies, the Court should still dismiss those portions of the Petitions that do not challenge the agency's authority under the Atomic Energy Act to issue a license for the storage of spent nuclear fuel. If the Court exercises jurisdiction over any part of the Petitions, the Petitions should be denied.

Respectfully submitted,

/s/ *Justin D. Heminger*
TODD KIM
Assistant Attorney General

JUSTIN D. HEMINGER
Attorney
Environment and Natural Resources Division

/s/ *Andrew P. Averbach*
MARIAN L . ZOBLER
General Counsel

ANDREW P. AVERBACH
Solicitor
U.S. Nuclear Regulatory Commission

April 18, 2022

CERTIFICATE OF SERVICE

I certify that on April 18, 2022, I served a copy of the foregoing **BRIEF FOR FEDERAL RESPONDENTS** upon counsel for the parties in this action by filing the document electronically through the CM/ECF system. This method of service is calculated to serve counsel at the following e-mail addresses:

Michael Abrams
Michael.Abrams@oag.texas.gov, hollis.duncan@oag.texas.gov, katrina.shanks@oag.texas.gov

Ryan Baasch
Ryan.Baasch@oag.texas.gov, valeria.alcocer@oag.texas.gov

Justin Heminger
justin.heminger@usdoj.gov, efile_app.enrd@usdoj.gov

Arnold Bradley Fagg
brad.fagg@morganlewis.com

Allan L. Kanner
a.kanner@kanner-law.com k.crowell@kanner-law.com,

Annemieke Monique Tennis
a.tennis@kanner-law.com

/s/ Andrew P. Averbach
Andrew P. Averbach

Counsel for Respondent
U.S. Nuclear Regulatory Commission

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit set forth in the Court's order of February 23, 2022 because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) this document contains 21,453 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ *Andrew P. Averbach*
ANDREW P. AVERBACH

Counsel for Respondent
U.S. Nuclear Regulatory Commission